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		LEVEL <i>"I-1 Decide What Cases to Prosecute and You Decide What Infantry Tactics to Employ:-                  Proposal to Eliminate the Commander's Power to Refer Charges to Trial by Court-Martial..."</i>																													
		DOCUMENT IDENTIFICATION <i>April 1999</i>																													
		<b>DISTRIBUTION STATEMENT A</b> Approved for Public Release Distribution Unlimited																													
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**“I’LL DECIDE WHAT CASES TO PROSECUTE AND YOU  
DECIDE WHAT INFANTRY TACTICS TO EMPLOY” -- A  
PROPOSAL TO ELIMINATE THE COMMANDER’S  
POWER TO REFER CHARGES TO TRIAL BY COURT-  
MARTIAL -- ANOTHER STEP TOWARD  
DISASSOCIATING THE WORD “MILITARY” FROM  
“JUSTICE”**

A Thesis Presented to The Judge Advocate General’s School  
United States Army in partial satisfaction of the requirements  
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General’s School, the United States Army, the Department of Defense, or any other governmental agency.

BY MAJOR ROBERT K. FRICKE  
UNITED STATES MARINE CORPS

47<sup>TH</sup> JUDGE ADVOCATE OFFICER GRADUATE COURSE  
APRIL 1999

**“I’LL DECIDE WHAT CASES TO PROSECUTE AND YOU DECIDE WHAT  
INFANTRY TACTICS TO EMPLOY”—A PROPOSAL TO ELIMINATE THE  
COMMANDER’S POWER TO REFER CHARGES TO TRIAL BY COURTS-  
MARTIAL—ANOTHER STEP TOWARD DISASSOCIATING THE WORD  
“MILITARY” FROM “JUSTICE”**

**Abstract:** Unlike the civilian criminal justice system, “prosecutorial discretion” in the military justice system is vested completely in the commander. When public attention has focused on the military justice system recently, most often it has centered on the question of who decides how cases are disposed of and how the decision is made. While this may not *be* a problem in fact, it is *perceived* by many as such. This thesis will examine the historical context in which “prosecutorial discretion” was given to commanders. It will address whether the reasons for that decision enjoy continued vitality today, especially in light of the expanded jurisdiction of courts-martial. It will explore the problems created by commanders when they exert “unlawful command influence,” both intentionally and unintentionally, during the pretrial process. The paper will also examine whether the “checks” that Congress created within the Uniform Code of Military Justice (U.C.M.J.) successfully combat the problem of “command control.” This thesis will propose modifications to our present system of military justice that will decrease the central role of the commander. It will argue that “prosecutorial discretion” exercised in the decision to refer charges to courts-martial belongs not with the commander, but with the military equivalent of a civilian district attorney. It will propose a new model where commanders will retain the power to conduct “non-judicial punishment” and summary courts, but will transfer the power to convene and refer charges to special and general courts-martial (to include “NJP/Summary refusals”) to a judge advocate. The judge advocate will be a member of the same service as the

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commander, in the grade of O-5/O-6, serving in a billet equivalent to a "district attorney"  
for that installation.

**“I’LL DECIDE WHAT CASES TO PROSECUTE AND YOU DECIDE  
WHAT INFANTRY TACTICS TO EMPLOY”—A PROPOSAL TO  
ELIMINATE THE COMMANDER’S POWER TO REFER CHARGES  
TO TRIAL BY COURTS-MARTIAL—ANOTHER STEP TOWARD  
DISASSOCIATING THE WORD “MILITARY” FROM “JUSTICE”**

MAJOR ROBERT K. FRICKE

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## I. Introduction

“It is true today, as it was in the time of the Founding Fathers, that the methods for maintenance of Army discipline should be subject to public opinion as expressed through Congress.”<sup>1</sup>

True to that thought, Congress created the Blair Commission to review three issues: adultery and fraternization, basic training, and gender integrated and gender segregated basic training.<sup>2</sup> The first issue touches on our military justice system and whether it is applied consistently.<sup>3</sup>

Unlike the civilian criminal justice system, the military criminal justice system vests the commander with “prosecutorial discretion.”<sup>4</sup> “When public attention has focused on the

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<sup>1</sup> United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 43 (1955) (Reed, J., dissenting).

<sup>2</sup> Congressional Commission on Military Training and Gender Related Issues, Pub. L. No. 105-85, § 561, 111 Stat. 1750, (1998). This Commission was chaired by Ms. Anita K. Blair.

<sup>3</sup> In her opening statement to the subcommittee, Ms. Blair answered the statute’s question about perceptions of inconsistent application of laws and rules by stating:

The commission had three unanimous resolutions on that subject.

Number one, the commission recommends that the secretary of defense take steps to cause the services to educate their members and to inform the public about the special consideration that affect the prosecution of offenses relating to sexual misconduct in the military.

Number two, the commission recommends that the services improve military justice data collection systems so that the services may better monitor the consistency of application of rules governing sexual conduct in the military and avoid or correct misperceptions.

Number three, there is a need to increase leader training at all levels, in knowledge and application of military law, and to increase their participation in the military justice system.

*See Hearing on the Blair Commission Before the Military Personnel Subcomm. of the House Armed Services Comm.*, FED. DOCUMENT CLEARING HOUSE, INC. (Mar. 17, 1999).

<sup>4</sup> See UCMJ art. 15, 22-24 (1998); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 401-407 (1998) [hereinafter MCM] (implementing these articles). In all of the services, flag and general officers in command normally have the power to convene and refer charges to general courts-martial. Service regulations promulgated pursuant to these articles further identify those subordinate commanding officers empowered to convene inferior courts-martial. As an example, in the Marine Corps, the power to convene special courts-martial is provided to battalion commanders (lieutenant colonels). In the Army, the battalion commander does

military justice system recently, most often it has centered on the question of who decides how cases are disposed of and how the decision is made.”<sup>5</sup> While this may not *be* a problem in fact, it is *perceived* by many as such.<sup>6</sup> If this is the thrust of public opinion, we as caretakers of the system must analyze this perception, to see if it is supported in fact, and to suggest corrective measures.

Recently, there have been two highly visible “attacks” on the commander’s power to refer charges to trial by court-martial. In the area of adultery prosecutions in the United States military, proposed “prosecutorial guidelines” have been published for public comment.<sup>7</sup> The stated purpose of these guidelines is to assist the commander in determining when adulterous acts are prejudicial to good order and discipline or are of a nature to bring

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not have that power. Special court-martial convening authority is reserved for brigade commanders (colonels). *see e.g.*, U.S. DEP’T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL, § 0120 (3 Oct. 1990) (C2, 23 Feb. 1995); U.S. DEP’T OF ARMY, REG 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 5-2 (24 June 1996).

<sup>5</sup> *See generally* Brigadier General John S. Cooke, The Manual for Courts-Martial—20X, The Twenty Sixth Annual Kenneth J. Hodson Lecture delivered to The Judge Advocate General’s School, U.S. Army (Mar. 10, 1998), in 156 MIL. L. REV. 1 (1998)

The issue has not really been so clearly framed as that, but if you look at most of the recent well-publicized cases, the issue has not been whether someone can get a fair trial in a court-martial, but why someone was or was not going to trial at all. Tailhook, the Black Hawk shoot-down, Kelly Flinn, Khobar Towers—in all these cases and others, the focus has been whether the military was protecting people by not prosecuting them or was unfairly singling them out for prosecution.

<sup>6</sup> *See generally*, Mark Thompson, *Sex, The Army And A Double Standard*, TIME, Apr. 27, 1998; *cf.* CNN Interactive, *Congresswoman Wants Probe of Military Spouse Abuse* (visited Jan. 18, 1999) <<http://cnn.com/US/9901/18/military.spousal.abuse.03.ap.ap/index.html> (Describing a “60 Minutes” report on domestic violence in the military. A clinical social worker hired by the Marines at Camp Pendleton to investigate cases of domestic violence and make recommendations stated that when she requested military protective orders to keep servicemen away from abused spouses, superior officers often would say, “No. I know what’s best. This is my Marine, and I will take care of him.” Representative Carolyn Maloney of New York has called on Congress to investigate domestic violence in the military.).

<sup>7</sup> 63 Fed. Reg. 43,687 (1998).

discredit upon the armed forces.<sup>8</sup> Technically, the commander retains unfettered prosecutorial discretion to refer, or decline to refer, charges of adultery to trial by court-martial. Practically, he must now work through a checklist to justify his decision. No other “guidelines” have been proposed for any other offense listed in the Manual for Courts-Martial (MCM). In Canada, legislative proposals have been approved to reform the Canadian military justice system in light of their forces' experience during the Somalia peacekeeping mission.<sup>9</sup> Chief among the reforms is a move to remove the power of the commander to refer charges to courts-martial and to transfer it to an independent director of military prosecutions.<sup>10</sup> This article will examine both proposals in the context of the continuing debate about “command control” in military systems of justice.

This article will explore the philosophical and practical problems of vesting prosecutorial discretion in the commander. It will propose a change to our system that will transfer the power to refer charges to trial by court-martial from the commander to a “military district attorney,” independent of the chain-of-command. First, the article will briefly examine the historical context in which “prosecutorial discretion” was given to commanders. It will address whether the reasons for that decision enjoy continued vitality today, especially in light of the expanded jurisdiction of courts-martial.<sup>11</sup> Second, it will examine the tension that

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<sup>8</sup> *Id.*

<sup>9</sup> Interview with Lieutenant Colonel J. C. Holland, Assistant Judge Advocate General (Atlantic Region), Canadian Forces, in Charlottesville, Va. (Mar. 2, 1999);

<sup>10</sup> See An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts (Bill C-25), 46 Eliz. 2, ch. N-5 (1997) (Can.).

<sup>11</sup> See *Solorio v. United States*, 483 U.S. 435 (1987) (overruling the “service connection” test set out in *O’Callahan v. Parker*, 395 U.S. 258 (1969) and returning to the “military status of the accused” test thereby greatly increasing court-martial jurisdiction); *but cf.* *United States v. Loving*, 116 S.Ct. 1737, 1751 (Stevens, J. concurring) (questioning whether the “military status of the accused” test should be extended to death penalty cases).

exists between the military commander's role to maintain good order and discipline in his unit and to ensure fairness in the military justice system. A primary focus will be on the problems created by commanders when they exert "unlawful command influence" during the accusatorial process leading to courts-martial. Third, the article will examine whether the "checks" that Congress created within the Uniform Code of Military Justice<sup>12</sup> (UCMJ) successfully combat the problem of "command control."

The article will argue that the exercise of "prosecutorial discretion" in the referral of charges to trial by special and general courts-martial belongs not with the commander, but with the military equivalent of a district attorney. It will propose a new model. Commanders will retain the power to conduct "non-judicial punishment"<sup>13</sup>, convene, and refer charges to summary courts-martial.<sup>14</sup> The power to convene and refer charges to trial by special and general court-martial (to include non-judicial punishment and summary court "refusals") will be transferred to a judge advocate. The judge advocate will be a member of the same service as the commander but will be outside the chain-of-command. He will be in the grade of O-5/O-6, and will serve in a billet analogous to a civilian "district attorney" for a specific installation or geographic region.

Finally, the article will defend the new model, arguing that its philosophical and practical advantages are superior to the present system. The commander today still remains responsible for the maintenance of good order and discipline within his unit. The article will show that any fear by the commander that the transfer of such power will result in a

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<sup>12</sup> See 10 U.S.C. §§ 801-946 (1994).

<sup>13</sup> MCM, *supra* note 4, pt. V, ¶ 1d.

concomitant loss in his ability to maintain good order and discipline in his unit is unfounded. The removal of the commander's power to refer charges to trial by court-martial will not thwart his ability to achieve that end state. In the end, it will enhance it.

## II. Background

### A. *The Role of the Prosecutor*

"A job description for a prosecutor would include a number of tasks, including whether to investigate possible criminal activities, whether to charge anyone, what charges to bring, whether to grant immunity, what forum to use, whether to plea bargain, and what sentence to recommend."<sup>15</sup> "The prosecutor's world has been described as one "of policy, of discretionary decision making, and of great power.""<sup>16</sup> "Another common feature is that each of these tasks involves an essentially legal decision based on sufficiency of evidence and the application of the statutory elements of crimes and standards of punishment."<sup>17</sup> "In the military justice system, prosecutorial discretion is vested neither in lawyers nor in prosecutors. Rather, it is vested in officers who command military units."<sup>18</sup>

### B. *The Historic Role of Commander as Convening Authority*

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<sup>14</sup> MCM, *supra* note 4, R.C.M. 403, 1302.

<sup>15</sup> Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is it Time for a Change?*, 19 AM. J. CRIM. L. 395, 396 (1992) (citing Peggy Clarke, *Prosecutorial Discretion*, 77 GEO. L.J. 695-697 (1989)).

<sup>16</sup> Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is it Time for a Change?*, 19 AM. J. CRIM. L. 395, 396 (1992) (citing JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 195 (1980)).

<sup>17</sup> Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is it Time for a Change?*, 19 AM. J. CRIM. L. 395, 396 (1992).

<sup>18</sup> *Id.* at 396.

The Uniform Code of Military Justice (UCMJ) governs the trials of accused service members.<sup>19</sup> Under our present system, the commanding officer decides whether to prosecute, who to prosecute, what charges to prosecute, and at what forum to prosecute.<sup>20</sup>

The American court-martial system has its roots in the British system.<sup>21</sup> The British maintained two separate courts-martial systems, one for the navy and one for the army.<sup>22</sup> The United States followed this model and maintained separate court-martial systems for the army and the navy up until the time of the Korean War.<sup>23</sup> British based Articles of War, which governed the maintenance of military discipline and the conduct of courts-martial for land forces, were first adopted by the separate colonies and then by the Continental Congress.<sup>24</sup> Articles for the Government of the Navy were also adopted from the British and “formed the basis of the American naval regulations of 1775.”<sup>25</sup> Under both systems, the commander had the power to “initiate charges, convene courts, appoint members and

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<sup>19</sup> See 10 U.S.C. §§ 801-946 (1994).

<sup>20</sup> See MCM *supra* note 4, R.C.M. 306, 401-404, 407.

<sup>21</sup> David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 144 (1980).

The Articles, or Rules and Articles of War, are statutory provisions for the enforcement of discipline and administration of criminal justice in the army, enacted by Congress in the exercise of the constitutional power “to make rules for the government and regulation of the land forces.” In their origin, however, a majority of these Articles considerably pre-date the Constitution, be derived from those adopted by the Continental Congress between 1775 and 1786, which were themselves taken from pre-existing British articles having their inception in remote antiquity.

WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENT* 17 (2<sup>nd</sup> ed. 1920).

<sup>22</sup> See generally, WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 5, 11 (1973).

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 145, 146.

<sup>25</sup> *Id.* at 11.

officers, and conduct a review of the proceedings.”<sup>26</sup> Both systems provided for a three tiered court system with increasing powers of punishment.<sup>27</sup> Both systems also provided for similar punitive articles.<sup>28</sup>

The rationale for vesting the power of prosecutorial discretion in the commander is perhaps best summed up by William Winthrop:

In this country prior to the adoption of the Constitution, Congress, which exercised the entire power of the government, executive as well as legislative, while itself expressly directing the institution of military courts in some cases, in general devolved the authority for this purpose upon the commander-in-chief of the army and the generals commanding in the separate states. To the latter this authority was expressly delegated by congress, by resolution of April 14, 1777, but it is noticeable that the authority, as ascribed to and exercised by the commander-in-chief, rested upon no express grant, but was apparently derived mainly by implication from the terms of Washington’s commission by which he was vested with **“full power and authority to act as he should think fit for the good and welfare of the service,”** and **enjoined to cause “strict discipline and order to be observed in the army.”** Considerably later, in the Articles of 1786, the authority was in terms vested in “the general or officer commanding the troops.”<sup>29</sup>

The court-martial was an instrument for instilling and maintaining discipline. As such, it was only natural to vest its power in the person charged with maintaining discipline—the commander. The injustice suffered by American servicemen at the hands of the military justice system during World War II caused civilian leaders to reexamine the court-martial system and “the exact relationship and balance between ‘discipline’ and ‘justice.’”<sup>30</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 12.

<sup>29</sup> WINTHROP, *supra* note 21 at 59.

<sup>30</sup> GENEROUS, *supra* note 22 at 19.

Unlawful command influence over trials was an essential concern and a number of studies recommended the removal of the commander from the court-martial process.<sup>31</sup> The American Bar Association recommended that the power to convene courts be taken from the commander and exercised by the Judge Advocate General.<sup>32</sup> These proposed reforms were rejected. As the 50<sup>th</sup> anniversary of the UCMJ approaches, this article offers that they are worth a second look.

### III. The Problem: The Competing Roles of Commander and Convening Authority

The military commander must carefully balance his roles as commander and convening authority.<sup>33</sup> As a commander, he is charged with maintaining the good order and discipline of his unit.<sup>34</sup> As a convening authority, he is charged to ensure fairness in the military justice system.<sup>35</sup> The commander who fairly administers the military justice system, and is

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<sup>31</sup> *Id.* at 20.

<sup>32</sup> *See To Amend the Articles of War, to Improve the Administration of Military Justice, to Provide for More Effective Appellate Review, to Insure Equalization of Sentences and for Other Purposes: Hearings on H.R. 2575, Before the No. 11 Legal Subcomm. On the House Armed Services Comm., 80<sup>th</sup> Cong. 2002 (1947)).*

<sup>33</sup> As to command and staff responsibility, the court remarked:

The duties of a division commander as a court-martial convening authority and as the primary leader responsible for discipline within the division are among the most challenging a commander can perform. On the one hand, effective leadership requires a commander to supervise the activities of his subordinates diligently and ensure that state of good order and discipline which is vital to combat effectiveness. On the other hand, he must exercise restraint when overseeing military justice matters to avoid unlawful interference with the discretionary functions his subordinates must perform. The process of maintaining discipline yet ensuring fairness in military justice requires what the United States Court of Military Appeals has called “a delicate balance” in an area filled with perils for the unwary. Many experienced line officers have expressed similar conclusions.

United States v. Treake, 18 M.J. 646, 653 (A.C.M.R. 1984) (en banc)

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

perceived to do so, will have a more disciplined unit.<sup>36</sup> In this respect, the role of convening authority should complement the role of commander. In practice, the goal of maintaining good order and discipline often competes with the goal of ensuring fairness in the military justice system, and is “achieved” at the expense of the latter.<sup>37</sup>

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<sup>36</sup> See *supra* note 75.

<sup>37</sup> In *Treakle*, the appellant plead guilty at a general court-martial to wrongful appropriation of nonappropriated funds and to making and submitting false official records. He was sentenced by a panel composed of officer and enlisted members. Two months after assuming command, the general court-martial convening authority began meeting with subordinate commanders and senior noncommissioned officers. These meetings, approximating 10 in number, occurred both prior to and after the appellant’s court-martial. One of the topics the convening authority addressed was a lack of consistency he perceived between subordinate commanders’ recommendations for referral to a general or bad conduct special court-martial and their subsequent testimony on behalf of soldiers at court-martial that the accused was a “good soldier” who should not be discharged. The court in *Treakle* set aside the appellant’s sentence due to the effect these remarks had on the members of his court-martial.

One last point: I do not attribute a malicious intent to the General. I believe he wanted to enhance the discipline and readiness of his command by expunging what he considered to be ineffective and undesirable soldiers. Unfortunately, because of who he was, the position he occupied, and the way he went about it, his conduct was unlawful and its effect far-reaching. As a commander and general court-martial convening authority, he should have realized that his voice represented to his subordinates the authority which their oaths of office or enlistment bound them to obey. Put in simple terms by a captain who testified on this issue, “When a Major General indicates displeasure over a situation people act to ensure the situation doesn’t happen again.” The impact of any conduct or action on his part in violation of Article 37, Uniform Code of Military Justice, resounds further, greater, and longer than does that of any other official in the court-martial system. This is true not only because of the potential repercussions upon persons tried by court-martial, but also because of the effect of unlawful influence upon the administration of criminal justice in the court-martial system. (citation omitted) Measured in these terms, General Anderson’s conduct can only be described as disastrous. I find that his conduct violated Article 37, Uniform Code of Military Justice, and was so pervasive, serious, and destructive to the court-martial process as to require setting aside both the findings and sentence regardless of the lack of an “specific prejudice” the appellant may have suffered. (citations omitted)).

*Treakle*, 18 M.J. at 668 (Yawn, J., concurring in part and dissenting in part).

While enlisted service members do take an oath to obey the orders of the officers appointed over them, officers do not. Judge Yawn’s misconception about that fact is in all likelihood shared by many military officers.

#### Oath of Enlistment

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; **and that I will obey the orders of the President of the United States and the orders of the officers appointed over me**, according to regulations and the Uniform Code of Military Justice. So help me God. (emphasis added).

There is a fine line drawn between the duties of commander and convening authority. The cost of crossing that fine line is perhaps best illustrated by an epilogue published to the opinion in *United States v. Thomas*<sup>38</sup>:

One of the most sacred duties of a commander is to administer fairly the military justice system for those under his command. In these cases the commander, for whatever reason, failed to perform that duty adequately. Likewise, it is also apparent either that his legal advisor failed to perceive that a problem was developing from General Anderson's stated policies or that he was unable or unwilling to assure that the commander stayed within the bounds prescribed by the Uniform Code of Military Justice. The delay and expense occasioned by General Anderson's intemperate remarks and by his staff's implementation of their understanding of these remarks are incalculable. Several hundred soldiers have been affected directly or indirectly—if only because of the extra time required for completing appellate review of their cases. In addition, the military personnel resources—as well as those of this Court—required to identify and to surgically remove any possible impact of General Anderson's overreaching have been immense. Finally, and of vital importance, the adverse public perception of military justice which results from cases like this undercuts the continuing efforts of many—both in and out of the Armed Services—to demonstrate that military justice is fair and compares favorably in that respect to its civilian counterparts.<sup>39</sup>

A. *A Systemic Problem with the Competing Roles of Commander & Convening Authority*

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Oath of Office

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

U.S. MARINE CORPS, FMFM 1-0, LEADING MARINES p. 108.

<sup>38</sup> 22 M.J. 388 (C.M.A. 1986).

<sup>39</sup> Thomas, 22 M.J. at 400.

The dual roles of commander and convening authority create an inevitable conflict when charges are referred to trial by court-martial. The commander cannot be “fair” when he becomes an “advocate.” The decision to refer charges to trial by court-martial is a “prosecutorial decision” at its heart. By that act, the convening authority assumes an “adversarial role.” By that act, he also sends a *message* to those in his command he will pick to judge the accused. The present structure of our military justice system is ill equipped to deal with this contradiction. It acknowledges the commander’s adversarial role. The solution it offers is to engage in “legal contortion” in a feeble attempt to disabuse panel members from attaching any relevance to the commander’s act of referral.<sup>40</sup>

### *1. The Referral Problem*

The Court of Military Appeals acknowledged early on the conflict with the commander who refers charges to trial by court-martial also picking the members of that court.<sup>41</sup>

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<sup>40</sup> Question 12 of the Military Judge’s voir dire of the members provides:

You are all basically familiar with the military justice system, and you know that the accused has been charged, his charges have been forwarded to the convening authority and referred to trial by him. None of this warrants any inference of guilt. Can each of you follow this instruction and not infer that the accused is guilty of anything merely because the charges have been referred to trial?

U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES’ BENCHBOOK, at 2-42 (30 Sept. 1996)

<sup>41</sup> *See generally* United States v. Gordon, 2 C.M.R. 161 (C.M.A. 1952).

Over the years, a bitter controversy has existed over the fairness of a system which grants to a commander, as an attribute of command, the right to select members of a court to try personnel of his command. Without joining either side in that argument, we can say that we would overlook the realities of the situation and the history of military justice if we did not know, that Congress intended when it enacted the Uniform Code of Military Justice to modernize the military judicial system and grant to an accused the right to be tried by **as fair and impartial a court as is consistent with the maintenance of an efficient military organization**, and, that it further intended to narrow the commander’s influence on the court by insulating members from any type of control by the commander’s expressed direction, or by his moral suasion or persuasion. (emphasis added).

*id.*, at 164-165.

However, there is a danger other than the overt attempt by a commander to assert his moral “suasion” or “moral persuasion” over the panel. The *unspoken danger* is the subliminal “implied message” contained in the commander’s act of referral.<sup>42</sup> Concern about the communication of this *message* is heightened in our present system where the commander selects members of his own command to sit in judgment of the accused.<sup>43</sup>

A commander cannot “ethically” refer an accused to trial by court-martial unless he meets two prerequisites. First, he must believe the accused has committed misconduct by some standard of evidence.<sup>44</sup> Second, he must believe that his own powers of punishment are insufficient to deal with the alleged offense(s).<sup>45</sup> There are two exceptions to this general rule. The first is the case where there has been a “nonjudicial punishment”<sup>46</sup> or “summary court”<sup>47</sup> refusal. In that case, the commander believes his powers of punishment are adequate but the accused has elected trial of a different type. The second is where the commander feels constrained by political pressure to refer a case to trial. Excepting these two categories of cases, it defies common sense to believe that the “ethical” commander would refer charges to trial if he did not personally believe in the accused’s culpability.

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<sup>42</sup> Cf. *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989) (holding commander’s testimony was a euphemism for a punitive discharge); *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986) (holding commander had no foundation to offer an opinion about the accused’s rehabilitative potential). The courts have expressed concern in this line of cases about the danger of unlawful command influence when commanders testify about an accused’s lack of rehabilitative potential. This concern about keeping the commander “out of the courtroom” lends support to the argument that the commander’s “silent testimony” through his “act of referral” should also be closely scrutinized. *see also supra* note 161.

<sup>43</sup> *See* UCMJ art. 25(d)(2) (1998).

<sup>44</sup> *See* discussion *infra* Part VI.B.7.

<sup>45</sup> *See supra* notes 369-48.

<sup>46</sup> *See* MCM *supra* note 4, pt. V, ¶ 3 (1998).

Even if the commander does not personally believe in the accused's culpability, other aspects of military life support the *perception* that the commander personally believes in the accused's guilt by the time a case is referred for trial.<sup>48</sup> Undoubtedly, the commander has appointed someone within his command to investigate and report on the alleged offense(s) before he decides how to dispose of the matter. He is duty bound to do so.<sup>49</sup> He has complete discretion in how to handle the incident.<sup>50</sup> The range of options spans from "no action" to trial by court-martial. The members of his command are aware of these options. In the case of the general court-martial, an article 32 investigation is completed. The subordinate commander forwards the case with a recommendation for trial by general court-martial. In addition, the commander's staff judge advocate must find as a prerequisite to referral that the specification(s) are "warranted by the evidence."<sup>51</sup> Those members of the accused's panel who are familiar with the military justice system are aware of the "wickets" through which the case must pass to get to trial. If they are not, the military judge tells them.<sup>52</sup> They know the commander's view of the charges without his ever having uttered a word to them.<sup>53</sup>

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<sup>47</sup> See MCM *supra* note 4, R.C.M. 1303 (1998).

<sup>48</sup> Cf. *United States v. Thomas* 22 M.J. 388 (C.M.A. 1986). In affidavits prepared by two officers relative to the issue of unlawful command influence, the affidavits related that the staff judge advocate had told them "that if a commander recommends trial by a court-martial authorized to adjudge a punitive discharge, he must believe that the accused is guilty and should be eliminated from the service." *id.* at 392.

<sup>49</sup> See MCM *supra* note 4 R.C.M. 303.

<sup>50</sup> See MCM *supra* note 4 R.C.M. 306.

<sup>51</sup> See UCMJ art. 34 (1998).

<sup>52</sup> See *supra* note 40.

<sup>53</sup> See *supra* notes 48-57.

Current trial procedure reinforces this implied message. The members get an immediate reminder at trial about the identity of the author of this message.<sup>54</sup> The commander's referral decision is bolstered shortly after the court-martial is assembled. The members hear how the case was referred when the prosecutor reads the preliminary "trial script." This recitation of the procedural process leaves the members with the impression that a number of individuals have previously "concurred" with this referral.<sup>55</sup> Those members who did not know previously are now "enlightened." It serves as a "reminder" for those who were previously familiar with the military justice system.

The potential danger of this *message* is best illustrated in the case of the accused referred to trial by summary court-martial. The perceptive summary court-martial officer recognizes the implied message in his commander's convening of such a court.<sup>56</sup> The not so subtle message is that not only does the commander believe in the accused's culpability, but he is also interested in a particular type of punishment.<sup>57</sup> Were this not so, the commander would

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<sup>54</sup> U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, at 2-36 (30 Sept. 1996) ("TC: The court is convened by court martial convening order number \_\_\_\_\_, Headquarters \_\_\_\_\_ dated \_\_\_\_\_ (as amended by \_\_\_\_\_), (a copy) (copies) of which (has) (have) been furnished to each member of the court.").

<sup>55</sup> See *id.* at 2-41 ("TC: The general nature of the charge(s) in this case is: \_\_\_\_\_. The charge(s) (was) (were) preferred by \_\_\_\_\_; forwarded with recommendations as to disposition by \_\_\_\_\_ (and investigated by \_\_\_\_\_).").

<sup>56</sup> Cf. *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie6.htm>>.

Because officers presiding at summary trials are not necessarily impartial since they may know the accused and have a direct interest in the outcome of the trial, namely the well-being of their unit, we believe that they should be distanced further from active involvement in specific cases than is presently the case.

*id.*

<sup>57</sup> Compare MCM *supra* note 4, pt. V, ¶ 5 (limitations on punishment at nonjudicial punishment) with MCM *supra* note 4 R.C.M. 1301(d) (limitations on punishment at summary courts-martial); Most notable between the

simply handle the matter at Article 15 where he need only convince himself of the accused's guilt. Depending on the service, the standard of proof may also be less onerous.<sup>58</sup> The summary court-martial officer who fails to receive and act on this *message* is unlikely to serve in that capacity again.

The civilian district attorney may convey the same *message* of his belief in the guilt of the defendant with his "criminal information" or "indictment," but there are a number of significant differences between his "referral" and that of the commander. First, absent the case of the repeat offender, there is a good chance that the civilian district attorney does not know the accused. The line between a "personal interest" and an "official interest" in the case is much brighter. Second, the indictment is the judgment of the grand jury, not the prosecutor.<sup>59</sup> Third, the district attorney does not have the power to influence the daily lives of his jury as the convening authority does his "panel." Unlike a court-martial panel, the civilian jury does not come back to work for the district attorney when the case is completed. Many aspects of court-martial members' lives are subject to potential control by the commander to include leave, liberty, and performance evaluation for promotion.<sup>60</sup> This

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two is the ability of the summary court-martial to impose "brig time," and to adjudge reductions in rank in the case of staff noncommissioned officers.

<sup>58</sup> Compare U.S. DEP'T OF ARMY, REG 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 3-18(l) (24 June 1996) (holding that "punishment will not be imposed unless the commander is convinced beyond a reasonable doubt that the soldier committed the offense(s).") with U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL, § 0110b (3 Oct. 1990) (C2, 23 Feb. 1995) (holding that the standard of proof is a "preponderance of the evidence," rather than "beyond a reasonable doubt.").

<sup>59</sup> See *supra* note 133 and accompanying discussion.

<sup>60</sup> See generally Department of Defense News Briefing, Office of the Assistant Secretary of Defense (Public Affairs) (Jul. 29, 1998) (statement of Vice Adm. Dennis Blair, Director of the Joint Staff) (visited Feb. 6, 1999) <[http://www.defenselink.mil/news/Jul1998/t07291998\\_t0729asd.html](http://www.defenselink.mil/news/Jul1998/t07291998_t0729asd.html)>..

working relationship is even more acute at the special court-martial level. The district attorney has no such power over the lives of his jury. The broad powers given to a commander over the personnel of his unit are antithetical to the role he must play in the administration of justice. Fourth, as to the general court-martial, "article 32 investigations inhibit prosecutorial discretion less than do grand juries, with which they are continually compared and contrasted."<sup>61</sup> The transfer of referral power from the commander to the military district attorney would maintain these distinctions.

#### IV. The Failure of Existing Checks and Balances

The need for national defense mandates an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence. Yet, the dictates of individual liberty clearly require some check on military authority in the conduct of courts-martial. The provisions of the UCMJ with respect to court-martial proceedings represent a congressional attempt to accommodate the interests of

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Our superiors in the armed forces have incredible authority over their subordinates. In war, they send them out to die. In peace time, the superior's decisions make the difference between success, professional success and failure in each of our servicemen and women's career. So they have to be fair and impartial and they have to be perceived to be.

For the extent of power that might be exercised over one's career, *see* United States v. Youngblood, 47 M.J. 338 (1997). During a staff briefing the wing commander and staff judge advocate shared their perceptions of how previous subordinate commanders had "underreacted" to misconduct in performing their duties as court-martial members. The general had even gone so far as to forward a letter to the gaining command of one member and told those present that he had expressed in the letter his opinion that "that officer had peaked." *id.* at 340.

<sup>61</sup> HOMER E. MOYER, JR., JUSTICE AND THE MILITARY §3-132 (1972) ("In terms of the screening function, the clearest difference is that although prosecutors generally have little difficulty getting indictments, if a grand jury does return a "no bill," a civilian case may not be taken to trial."); *see also* United States v. Bradley, 47 M.J. 715 (A.F. Ct. Crim. App. 1997) ("Acting SJA for the general court-martial convening authority advised the convening authority to refer the rape charge and first specification of indecent assault to trial, even though the Article 32, UCMJ, 10 U.S.C.A. § 832, investigating officer had recommended "dropping" those charges based on insufficient evidence.").

justice, on the one hand, with the demands for an efficient, well-disciplined military, on the other.<sup>62</sup>

Congress has built a number of checks into the military justice system to combat the dangers of command control of the fairness of judicial proceedings. Included among those checks are the “accuser concept” embodied in article 1(9),<sup>63</sup> article 34,<sup>64</sup> article 37,<sup>65</sup> article

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<sup>62</sup> Curry v. Secretary of the Army, 595 F.2d 873, 880 (D.C. Cir. 1979).

<sup>63</sup> Article 1(9) provides:

The term “accuser” means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

UCMJ, art. 1(9) (West 1995).

Article 1(9) becomes relevant as a protection for an accused when it is read in conjunction with subparagraph (b) of articles 22 [Who may convene general courts-martial] and 23 (Who may convene special court-martial).

Article 22(b) provides:

If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.

UCMJ, art. 22(b) (West 1995).

Article 23(b) provides:

If any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered advisable by him.

UCMJ, art. 23(b) (West 1995).

<sup>64</sup> Article 34 provides:

- (a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice. The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that—
  - (1) the specification alleges an offense under this chapter;
  - (2) the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) (if there is such a report); and
  - (3) a court-martial would have jurisdiction over the accused and the offense.

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- (b) The advice of the staff judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the staff judge advocate

- (1) expressing his conclusions with respect to each matter set forth in subsection (a); and
- (2) recommending action that the convening authority take regarding the specification.

If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification.

- (c) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made.

UCMJ art. 34 (West 1995).

<sup>65</sup> Article 37 provides:

- (a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.
- (b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

UCMJ, art. 37 (West 1995).

98,<sup>66</sup> and finally, and of last resort, the service courts of criminal appeals and the Court of Appeals for the Armed Forces.<sup>67</sup> Notwithstanding these checks, unlawful command control continues to plague the military justice system.<sup>68</sup>

#### A. *The Accuser Concept*

##### 1. *Background*

Related to the power to refer charges to trial by court-martial is the power to convene a court-martial. Charges cannot be referred until a court exists.<sup>69</sup> Congress listed in articles 22 and 23 of the UCMJ those commanders authorized to convene general and special courts-martial. Each article has a nearly identical paragraph “(b)” which disqualifies any such

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<sup>66</sup> Article 98 provides:

Any person subject to this chapter who—

- (1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or
- (2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;

shall be punished as a court-martial may direct.

UCMJ art. 98 (West 1995).

<sup>67</sup> See cases cited *supra* note 150.

<sup>68</sup> See *infra* Part IV.D.1.

<sup>69</sup> See *supra* note 4 MCM, R.C.M. 601 discussion.

Referral of charges requires three elements: a convening authority who is authorized to convene the court-martial and is not disqualified (*see* R.C.M. 601(b) and (c)); preferred charges which have been received by the convening authority for disposition (*see* R.C.M. 307 as to preferral of charges and Chapter IV as to disposition); and a court-martial convened by that convening authority or a predecessor (*see* R.C.M. 504).

commander if he is an “accuser” as defined by article 1(9).<sup>70</sup> The theory behind the disqualification of a commander as an “accuser” is not of recent origin.<sup>71</sup> The courts have developed a test for when a commander acting in his capacity as convening authority is disqualified as “any other person who has an *interest other than an official interest* in the prosecution of the accused.” The test is whether the convening authority “was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter.”<sup>72</sup> Put another way, “[i]f he insists on charging a subordinate with a personal affront to his dignity, then he colors the proceedings with a personal touch.”<sup>73</sup>

2. *The Accuser Concept as a Legal Fiction When Applied to Commanders—Does the Commander Really Only Have an Official Interest?*

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<sup>70</sup> See *supra* note 63.

<sup>71</sup> “The disqualification of a commander as “accuser or prosecutor” was first enacted in 1830 as an amendment to then Article of War 65. As explained by Colonel Winthrop:

Its purpose clearly was to debar a superior for selecting the court for the prosecution and trial of a junior under his command, and, as reviewing authority, passing upon the proceedings of such trial, or executing the punishment, if any, awarded him, in a case where by reason of having preferred the charge or undertaken personally to pursue it, he might be biased against the accused, if indeed he had not already prejudged his case.

United States v. Jeter, 35 M.J. 442, 448 (C.M.A. 1992) (Gierke, J., concurring in the result) (citing to WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENT* 61-62 (2<sup>nd</sup> ed. 1920) *quoted in* United States v. Gordon, 2 C.M.R. 161, 164 (C.M.A. 1952)).

<sup>72</sup> United States v. Gordon, 2 C.M.R. 161, 167 (C.M.A. 1952) (holding that it was improper for the commander to convene the appellant’s court-martial on a burglary charge where an additional charge alleging the attempted burglary of the convening authority’s residence was not referred to trial simply because of a lack of evidence corroborating the accused confession.); *accord* United States v. Corcoran, 17 M.J. 137, 138 (C.M.A. 1984) (holding commander disqualified from convening the court where a charge alleging the accused made a threat to the convening authority was withdrawn before trial); United States v. Crossley, 10 M.J. 376, 378 (C.M.A. 1981) (holding that it was improper for the commander to take post-trial action in a case where he presided at a ceremony where the breakdown of morale in a Marine Drum and Bugle Corps led to the calculated refusal of its members to respond to a motion to play and where he had previously personally intervened to prevent the transfer of the unit); Brookins v. Cullins, 49 C.M.R. 5 (C.M.A. 1974) (holding that the commander was disqualified from convening the court where he was personally involved in quelling a riot aboard his ship which gave rise to the charges against the accused).

<sup>73</sup> United States v. Keith, 13 C.M.R. 135, 139 (C.M.A. 1953).

The strongest argument for leaving the power with the commander to refer charges to courts-martial contains three simple points. First, the commander is “responsible for everything his unit does or fails to do.”<sup>74</sup> Second, until one has commanded one cannot fully appreciate the absolute indispensability of discipline to mission accomplishment. Third, the commander’s ability to refer charges to trial by courts-martial is a critical tool in ensuring military discipline. It follows that if the commander is held responsible for “everything his unit does or fails to do,” he must have the necessary tools to maintain discipline to successfully accomplish the mission.<sup>75</sup>

The argument is more powerful if we focus on strictly military offenses with no civilian counterpart (e.g., unauthorized absence, missing movement, disobedience, disrespect), and offenses committed by service members against fellow service members within the unit (e.g., larceny, communicating threats, assaults). Arguably, these categories of offenses have the greatest potential to degrade the good order and discipline of a unit as they tear at the trust and teamwork that are critical to unit cohesion and mission accomplishment.<sup>76</sup> In a sense, the commander is the true “victim” of these offenses.

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<sup>74</sup> See, e.g., U.S. DEP’T OF NAVY, U.S. NAVY REGULATIONS, para. 0702 (14 Sept. 1990) (holding commanders “responsible for the satisfactory accomplishment of the mission and duties assigned to their commands.”).

<sup>75</sup> See generally 96 CONG. REC. 1353 (1950) (statement of Sen. Kefauver), *reprinted in* II Index and Legislative History to the Uniform Code of Military Justice, 1950 at 1759-1760 (1985)

It is the position of the National Military Establishment that the uniform code has a number of added protections for the accused not found in the Articles of War or the Articles for the Government of the Navy which will guarantee a greater amount of justice and will provide a more legal proceeding which will effectively counteract any unwarranted command influence. ***They give a strong warning that completely divorcing command responsibility from command authority will impair military functions.*** (emphasis added).

<sup>76</sup> See generally *Hearings On the Implications of Adultery in the Military Before the Subcomm. on Oversight of Government Management, Restructuring and the District of Columbia of the Senate Comm. on Governmental*

If the commander uses the power to refer charges to trial by court-martial as a disciplinary tool, it is illogical to suggest that he is not “personally interested” in the “outcome” of the case.<sup>77</sup> The “correct” outcome is what provides the discipline.<sup>78</sup> If the referral of charges to trial by courts-martial is the commander’s tool of last resort for

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*Affairs* \_\_\_\_ Cong. \_\_\_\_ (1998), FED. DOCUMENT CLEARING HOUSE, INC. (Oct. 7, 1998) (statement of Lieutenant Colonel Robert L. Maginnis, USA (Ret.), Director, Military Readiness Project, Family Research Council)

Military culture demands camaraderie, absolute trust and teamwork. Out of necessity, military culture must constantly focus on its primary mission, which is to win wars. Soldiers behave toward one another according to a set of rigid standards—honesty, accountability, sacrifice, and absolute fairness. Anything that interferes with this focus can damage combat readiness, morale and unit cohesion.

<sup>77</sup> For an extreme example of a commander’s interest in the outcome of a case, *see* *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979)

In the present case, Captain Leibart’s presence can only be described as ubiquitous. He was the appellant’s accuser and his company commander. He was also the company commander of several witnesses for the Government and the defense, and in charge of their transportation to the courtroom and their feeding while there. He testified for the Government on a speedy trial motion and expected himself to be a witness for the Government on the credibility of a witness and the performance of the appellant. He openly communicated with a court member prior to assembly in the presence of witnesses to the court-martial on a matter directly related to the outcome of the trial. He entertained complaints of witnesses of threats of bodily harm without reporting these matters to the trial court. He was clearly observed by witnesses at the court-martial eavesdropping on the proceedings. In the record of trial we find no justification as a matter of military necessity for Captain Leibart’s continued monitoring of the appellant’s court-martial proceedings. It is apparent that at the very least, he lacked the proper regard for the “delicate balance” that must be maintained between military justice and command discipline. (citations omitted)).

<sup>78</sup> One of the recommendations of the Powell Report was that the Judge Advocate General “institute a procedure for the guidance of newly appointed general court-martial authorities.” What follows is an excerpt from a proposed sample TJAG letter to commanders:

The results of court-martial trials *may not always be pleasing, particularly when it may appear that an acquittal is unjustified or a sentence inadequate*. Results like these, however, are to be expected on occasion. Courts-martial, like other human institutions, are not infallible and they make mistakes. In any event, the Uniform Code prohibits censuring or admonishing court members, counsel, or the law officer with respect to the exercise of their judicial functions. My suggestion is that, like the balls and strikes of an umpire, a court’s findings or sentence which may not be to your liking be taken as ‘one of those things.’ Courts have the legal right and duty to make their findings and sentences unfettered by prior improper instruction or later coercion or censure.

The Committee on the Uniform Code of Military Justice Good Order and Discipline in the Army, *Report to Honorable Wilber M. Bruckner, Secretary of the Army*, 20-21 (18 Jan. 1960) (emphasis added).

enforcing discipline within his unit, it follows that an acquittal at court-martial or an “inadequate” sentence defeats that purpose.<sup>79</sup> It is not the “act of referral” itself that equates to a more disciplined unit. Referral of charges to an improper forum, be it too lenient or too onerous, could have the opposite effect.<sup>80</sup> For the commander, enhanced discipline results from conviction coupled with an appropriate sentence. The message being “this individual was held responsible for his misconduct, is being made to pay a price, and the same will hold true for you if you act similarly.”

A commander might argue that even in the case of an acquittal, some measure of discipline results from the “act of referral” because the accused has suffered the punishment of having gone through the process. While the experience of having suffered through the process may deter an accused’s conduct in the future, it is also likely that “beating the system” may embolden an accused in the future.<sup>81</sup> In the bigger picture, the acquittal on strictly military offenses or offenses committed by one service member against another is probably more damaging to the discipline of the unit *as a whole*. The message is not necessarily “he got away with it,” although that message is certainly damaging to the discipline of a unit. Many will equate a verdict of “not guilty” with exoneration and the lack

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<sup>79</sup> *See id.*

<sup>80</sup> *Cf.* 96 CONG. REC. 1430 (1950) (statement of Sen. Morse), *reprinted in* II Index and Legislative History to the Uniform Code of Military Justice, 1950 at 1815 (1985):

Those of the Members of the Senate who have served, not in the exalted ranks of the generals and admirals, but in the lower echelons of the military, naval, and air forces, know that nothing will arouse the resentment of the men and women in the services as quickly and in such degree as the feeling that one of their number is receiving a raw deal from a court martial, and they will also know, as the rest of us must realize from our human experience, that a resentful individual is an inefficient individual and one who is far less amenable to discipline than those who have faith in their superiors.

<sup>81</sup> David Schlueter argued that “... few commanders are willing to run the risk of an acquitted servicemember returning to the unit and flaunting his “victory” over the command.” *see* Schlueter *supra* note 21 at 161

of veracity of the "victim," vice the failure of proof beyond a reasonable doubt. In short, the damage of a possible acquittal may outweigh any benefit sought through the act of referral.

While the courts have made a distinction between an "official interest" (permissible) and "an interest other than an official interest" (not permissible), this is in reality a legal fiction. Notwithstanding "affronts to personal dignity," the "official interest" in many cases is much stronger than the "personal interest." For example, most commanders would probably agree that a "drug dealer" in their unit is more detrimental to unit discipline than one who burglarizes the commander's personal residence. While there is an interest in disciplining both, the "accuser concept" permits the commander to refer charges in the case of the "drug dealer" but not in the case of the "burglar." Between the two, the commander's interest in the good order and discipline of his "unit" while he is in command is as great, if not greater than any "personal interest" he has in his "home." Yet, the purpose of the "accuser concept" is thwarted in the case of the drug dealer because of the label "official interest." If the rationale for the "accuser concept" is to prevent one with a strong interest in the outcome of a case (read "personal interest") from convening the court, then a commander should not hold such power over the members of his own unit.<sup>82</sup> In comparison, the civilian prosecutor with

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<sup>82</sup> United States v. Gordon, 2 C.M.R. 161, 166 (C.M.A. 1952) (citing to United States v. Charles D. Coleman, 17 Ops. Atty. Gen. 434, 439) In discussing Article of War 8, the precursor to the prohibition of an accuser convening a court now contained in Articles 22(b) and 23(b), UCMJ the opinion stated

[The purposes are to] guard against results which would not be in harmony with a proper sense of justice, and which might ensue if the officer by whom the charge is made, and who is interested in the issue, were permitted to detail the members of the court which is to try the accused, the danger being that such officer, under the influence of a strong feeling against the accused, might select those who are hostile to the latter or unduly biased in his own favor, and who, for that reason, would be less able to render a fair judgment in the case . . . ."

a “personal interest” would need to recuse himself.<sup>83</sup> In sum, it is only in the extreme case that the “accuser concept” comes into play. Its “protection” is illusory in the majority of cases.<sup>84</sup>

*B. Article 34—A Check on the Commander’s Prosecutorial Discretion?*

*1. Background*

A quick read of article 34<sup>85</sup> would lead one to conclude that it is a check on the exercise of prosecutorial discretion, at least with respect to general courts-martial. A closer reading reveals that not to be the case. Subparagraph (1) and (3) are jurisdictional prerequisites for a court-martial.<sup>86</sup> They deal with pure legal issues that relate to whether a court-martial has the power to hear and decide a particular accused’s case. When they are absent, a military judge

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<sup>83</sup> See generally AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 3-1.3, 3-2.10 (3d ed. 1993) (describing conflicts of interest, supercessions, and substitutions.).

<sup>84</sup> For a case in which the accused attempted to use the “accuser concept” as a sword, see *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992) Jeter was convicted at trial of the use and distribution of cocaine. On appeal, he submitted an affidavit that detailed his conversations with the convening authority, a Major General, about the General’s alleged promises to take care of him if he did not involve the General’s son in the case. The court was actually convened by the general’s subordinate. Jeter argued that the court-martial lacked jurisdiction because both the general and his subordinate were disqualified as “accusers.” The court held that such error was not “jurisdictional,” and the accused waived the issue by failing to raise it at trial.

Undoubtedly, the prohibition against the convening of a general or special court-martial by an “accuser” was designed to protect an accused from a vindictive commander seeking to obtain a conviction because of some personal interest in the case and using his power as a convening authority to obtain this result. Here, on the other hand, the tactics used by Jeter were intended to assure that the convening authority would tilt the scales of justice in favor of the accused—rather than against him.

*id.* at 446.

<sup>85</sup> See *supra* note 64.

<sup>86</sup> See MCM *supra* note 4, R.C.M. 201(b).

will grant a motion for appropriate relief.<sup>87</sup> Subparagraph (2) is also a pure legal issue though not a jurisdictional one. As will be shown later, while it theoretically could serve as a “check” on the exercise of prosecutorial discretion,<sup>88</sup> the broad “warranted by the evidence” standard and the realities of military life defeat any such function. As a “check,” subparagraph (2) only comes into play during trial at the close of the government’s case when the accused moves for a finding of not guilty.<sup>89</sup>

True prosecutorial discretion occurs only after these jurisdictional prerequisites are present, and sufficient evidence exists on each element to permit referral. When these three conditions are met, the question then arises as to what *should* be the appropriate disposition.<sup>90</sup> This powerful discretionary decision of the commander is generally not subject to judicial review absent a case of selective prosecution.<sup>91</sup> Therefore, there must be safeguards to ensure that the power is exercised appropriately.

## 2. *The History*

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<sup>87</sup> See MCM *supra* note 4, R.C.M. 907(b)(1).

<sup>88</sup> See To Amend Chapter 47 of Title 10, United States Code (The Uniform code of Military Justice), To Improve the Quality and Efficiency of the Military Justice System, To Revise the laws concerning review of Courts-Martial, and for other purposes: Hearing on S. 974 Before the Subcomm. on Military Personnel and Compensation of the House Comm. on Armed Services, 98<sup>th</sup> Cong. (1983) (written statement of MajGen. Hugh J. Clausen, JAGC, USA, Judge Advocate General of the Army)

No charge may be referred to a general court-martial, under the proposal, unless the staff judge advocate finds that it states an offense, is warranted by the evidence, and is subject to the jurisdictions of the court-martial. The convening authority retains the final power to decide whether to prosecute by general court-martial, but he can exercise this power **only after** the staff judge advocate has made the required legal determinations. (emphasis added)  
*Id.*

<sup>89</sup> See MCM *supra* note 4, R.C.M. 917.

<sup>90</sup> See MCM *supra* note 4, R.C.M. 306.

<sup>91</sup> See generally *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

*a. The Ancestors of Article 34—The Early Manuals for Courts-Martial*

Paragraph 35b of the Army's 1928 Manual for Courts-Martial stated in pertinent part that:

Subject to the provisions of this paragraph (35 b) reference to a staff judge advocate will be made and his advice submitted in such manner and form as the appointing authority may direct.

No appointing authority **shall direct** the trial of any charge by general court-martial **until he has considered** the advice of his staff judge advocate based on all the information relating to the case, including any report made under 35 c [suspected insanity], which is reasonably available at the time trial is directed.

The advice of the staff judge advocate shall include a written and signed recommendation of the action to be taken by the appointing authority. Such recommendation will accompany the charges if referred for trial. (See 41 d.)<sup>92</sup>

This provision requires the commander to consult with the staff judge advocate before referral of charges to a general court-martial. The advice received does not bind the commander's exercise of "prosecutorial discretion." The 1928 Army Manual, corrected to 1943, contained the same paragraph.<sup>93</sup> In the 1949 Army Manual, paragraph 35b was revised and referenced a corresponding Article of War.<sup>94</sup> Article of War 47(b) provided that:

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<sup>92</sup> A MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, ¶ 35b (1928) [hereinafter 1928 MANUAL].

<sup>93</sup> See A MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, ¶ 35b (1928 corrected to 1943) [hereinafter 1928 CORRECTED MANUAL].

<sup>94</sup> See A MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, ¶ 35b (1949) [hereinafter 1949 MANUAL]. Article 35b now provided:

Before directing the trial of any charge by general court-martial the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation thereof has been made as prescribed in Article 46b, that such charge is legally sufficient to allege an offense under the Article of War, and is sustained by evidence indicated

Before directing the trial of any charge by general court-martial the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial **unless it has been found** that a thorough and impartial investigation thereof has been made as prescribed in the preceding article, that such charge is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation.<sup>95</sup> (emphasis added).

Like the modern day article 34, the emphasized language in article of war 47(b) appears on its face to require certain “legal determinations” before a commander could direct trial by general courts-martial. It did not limit his discretion once these prerequisites were met.

*b. The Legislative History of Article 34*

(1) The 1950 Code

The initial draft of article 34 of the UCMJ was derived from Article of War 47b and mirrored its language.<sup>96</sup> The drafting efforts that resulted in the adoption of the 1950

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in the report of investigation (A. W. 47b). Subject to the provisions of this paragraph (35b), reference to a staff judge advocate will be made and his advice submitted in such manner and form as the appointing authority may direct; but the appointing authority will at all times communicate directly with the staff judge advocate in matters relating to the administration of military justice (A. W. 47a). The advice of the staff judge advocate shall include a written and signed statement as to his findings with respect to substantial compliance with the provisions of Article 46b [investigation], the legal sufficiency of the charge under the Articles of War, whether the charge is sustained by evidence indicated in the report of investigation, and shall include a signed recommendation of the action to be taken by the appointing authority. Such recommendation will accompany the charges if referred for trial. See 41d.

<sup>95</sup> See Articles of War of 1948, art. 47(b), *reprinted in* 1949 MANUAL, app. 1, at 273.

<sup>96</sup> See *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. Of the House Comm. On Armed Services*, 81<sup>st</sup> Cong. 1006 (1949), *reprinted in* I Index and Legislative History to the Uniform Code of Military Justice, 1950 at 474 (1985)

ART 34. Advice of staff judge advocate and reference for trial.

- (a) Before directing the trial of any charge by general court martial [sic], the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice. The convening authority shall not

Uniform Code of Military Justice (UCMJ) highlighted the problem with draft article 34's adoption of the "unless it has been found" language from Article of War 47b.<sup>97</sup> The phrase was ambiguous, and subject to differing interpretations. It appeared to committee members to leave an open question as to whom would make the legal determinations and who would have the final say over referral.<sup>98</sup>

The debate also highlighted the continuing controversy about "command control," but not as it related to article 34. The "command control" debate centered on the code's provisions providing for the commander's appointment of members.<sup>99</sup> The debate about article 34 was

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refer a charge to a general court martial for trial unless it has been found that the charge alleges an offense under this code and is warranted by evidence indicated in the report of investigation.

- (b) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence may be made. *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See *supra* note 100.

<sup>99</sup> See 96 CONG. REC. 1353 (1950) (statement of Sen. Kefauver), *reprinted* in II Index and Legislative History to the Uniform Code of Military Justice, 1950 at 1759-1760 (1985)

I believe it is advisable at this point to stop and outline for the members of the Senate the controversy which exists in connection with the provisions of these three articles [Articles 22, 23, and 24 which provide members of general, special, and summary courts martial be appointed by the President, the Secretaries of the three Departments, and certain commanding officers]. Certain witnesses before our committee and the House committee opposed this method of selecting court members and claimed that it is the one serious defect of the Uniform Code, in that it enables a continuance of command control, which, in their opinion, deprives courts martial of their independence.

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The critics of these provisions concede that the commanding officer should retain the right to refer charges for trial, select the trial counsel, and review the sentence after trial. They would, however, take away from the commanding officer the right to appoint the members of the court.

*Id.*

not about the need to provide an accused with an important pretrial protection. Instead, it was about ensuring that the language of the article reflected unambiguously who would make the legal determinations and who would have the final say about referral.<sup>100</sup>

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<sup>100</sup> See *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. Of the House Comm. On Armed Services*, 81<sup>st</sup> Cong. 1006 (1949), reprinted in *I Index and Legislative History to the Uniform Code of Military Justice*, 1950 at 474 (1985)

MR. BROOKS [Chairman]. Is there any discussion on this article?

MR. ELSTON. I would like to ask a question or two about it. *Does not that section practically leave it up to the staff judge advocate to say whether or not there is sufficient evidence to warrant the charge even being made?*

MR. LARKIN. [Assistant General Counsel, Office of the Secretary of the Defense] It requires, Mr. Elston, that he review the findings of the investigation and advise the convening authority whether, *in his opinion*, there is sufficient evidence. *It is left, however—that is, the decision is left to the convening authority, which is the present procedure.*

MR. ELSTON. Do you think the language “unless it has been found that the charge alleges an offense under this code and is warranted by evidence” *pretty much makes the staff judge advocate the final judge?*

MR. LARKIN. No. *I think not. If it does, it should not.*

MR. RIVERS. [Vice Chairman] *It certainly sound [sic] like it, to me.*

MR. LARKIN. The subject of the sentence is the convening authority, in the very beginning.

The convening authority shall not refer a charge to a general court martial \* \* \*

MR. SMART. [Professional Staff Member] Mr. Chairman, I think the words “unless it has been found” should be considered this way: The question arises from an interpretation. Do the words mean by the staff judge advocate or by the convening authority? *My feeling about that is that in the first instance you should not make that choice hinge upon the staff judge advocate, but rather upon the convening authority, assuming that the command remains the convening authority.*

MR. ELSTON. *That is exactly the point that I was making. The way it reads it would seem that it might be up to the staff judge advocate to make the decision; and I know that is not what you want.*

MR. LARKIN. *That is right.*

MR. RIVERS. It should be rewritten; should it not?

MR. ELSTON. I do not know; *it certainly might be susceptible of a different interpretation.*

MR. LARKIN. I think so, *unless the legislative history, or this discussion here is used as the guide. We might change “unless it” to “unless he.”*

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MR. ELSTON. Could you not have it read something like this: "unless he finds after being advised by the staff judge advocate that the charge alleges an offense" and so forth, *so as to leave it to the command, the convening authority, to be the final judge?*

MR. LARKIN. Yes.

MR. SMART. I think I can suggest an amendment which will do that for you, sir.

MR. BROOKS. What is your suggestion, Mr. Smart?

COLONEL DINSMORE. [U.S. Army Departmental Witness] This was the subject of some discussion. Mr. Larkin and I talked about it briefly. I would like to have permission to give Mr. Smart the benefit of whatever that situation was at that time in connection with drawing the amendment.

MR. SMART. May I ask Colonel Dinsmore this: *It is your understanding, is it not, Colonel, that the choice as to whether or not charges and specifications will be referred to trial rests with the convening authority and not with the staff judge advocate?*

COLONEL DINSMORE. *That is correct; that is so, indeed.*

MR. SMART. With that understanding I would suggest, on page 30 of the bill, line 21, that the word "he" be substituted for the word "it" and after the word "has" delete the word "been." So that the sentence would now read:

The convening authority shall not refer a charge to a general court martial for trial unless he has found that the charge alleges an offense under this code—

and so forth.

MR. ELSTON. *I think that takes care of it.*

MR. BROOKS. Are there any further suggestions?

MR. RIVERS. *I think we must keep in mind that all this comes under pretrial procedure.*

MR. SMART. Exactly.

MR. GAVIN. Have there been any changes made in this article, Mr. Chairman?

MR. BROOKS. Mr. Elston has suggested a change, which Mr. Smart put in certain language. The change is:

The convening authority shall not refer a charge to a general court martial for trial unless he has found that the charge alleges an offense under this code and is warranted by evidence indicated in the report of the investigation.

MR. GAVIN. *The only question I wanted to raise was as to the term, "the convening authority." That refers to the staff judge advocate; does it not?*

MR. BROOKS. *That was the purpose of this suggested amendment or change, to strike that out.*

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MR. GAVIN. What are you putting in its place?

MR. SMART. The change is on line 21, Mr. Gavin.

MR. GAVIN. I see it in lines 18 and 20.

MR. SMART. I think I understand the point you are raising, Mr. Gavin.

MR. GAVIN. *The point that I am making is that it still leaves it in the convening authority, leaves it in the command authority.*

MR. SMART. *That comes back again to what you want to do about the convening authority. This does not say that the convening authority is staff judge advocate. It merely says, whoever is the convening authority will approve the charges and specifications.*

MR. GAVIN. Going back to page 29, line 7, you state there:

by counsel appointed by the officer exercising general court-martial jurisdiction over the command.

Now you come along here and say:

officer exercising general court-martial jurisdiction.

Who is going to exercise this jurisdiction? The officer exercising general court-martial jurisdiction over the command. Here you come back and say, the officer exercising general court-martial jurisdiction.

MR. SMART. You have two different problems. The first problem that you raised regarding counsel represents a completely different situation than the one as to who will refer the charges? The counsel provisions on page 29 say that the authority exercising general court-martial jurisdiction will appoint the counsel, but this article has nothing to do with counsel. *This is the question, Who will refer the charges? This says the convening authority. The committee has not yet determined who will be the convening authority.*

MR. GAVIN. Is it the intention of the chairman to come back to articles 33 and 34 for discussion?

MR. BROOKS. I do not think it will be necessary under that interpretation *because when we decide who the convening authority is, that disposes of it.*

MR. RIVERS. It must be subject to the section we passed over. [referring to article 22]

MR. BROOKS. When we decide that, it may change the meaning of that particular section.

MR. SMART. I might add that if you do change the intent of the provision of article 22, that it will be necessary to amend the bill in many places other than in article 22.

MR. GAVIN. That is exactly what I am talking about.

MR. BROOKS. That is the reason I thought that we should have started today *to settle the point of command control.* I think this: I am not critical of anyone, because we are earnestly trying

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to do the best we can to write the best bill. *After all, these matters refer to pretrial procedure and the vital thing in the bill is the trial—not the pretrail, [sic] it seems to me. We can spend weeks on this pretrial procedure without affecting a great many of the fundamental rights of the accused.*

MR. ELSTON. We have only one more article before we take up trial procedures.

MR. RIVERS. Was not the reason why the chairman passed it over [article 22], among other things, in order to give anyone who cared to testify further an opportunity to appear?

MR. ELSTON. I do not believe trial procedure would be affected much by our subsequent decision about command authority, because it is more or less procedure that is already laid down by the code.

MR. BROOKS. *As to this pretrial matter, you have already decided that it is not a reversible error and so, regardless of what you put in here, if it is not carried through, it is not going to affect the fundamental rights of the accused a great deal.*

MR. RIVERS. If the commanding officer has some inkling that there is a violation in the articles of this code, he has got to be able to find it somewhere down the line here. But the ultimate result of the trial is another matter, as I see it.

MR. BROOKS. Why not, since we have gone thus far in the pretrial procedure, try to go ahead and finish it?

MR. LARKIN. I would like to point out one thing. *Article 22 has to do with the appointment of members of the court. This article, 34, has to do with the referral of the charges by the convening authority which is a different concept and which is supported by the people who are criticizing 22; the witnesses who have said that they would like to see the appointment of court members by a judge advocate and not by the convening authority are the same people who say that they believe it perfectly appropriate for the convening authority to refer the charges. They do not criticize that part of the convening authority's function. So that you can decide 22 and the position of the command and convening authority insofar as the appointment of court members is concerned, without affecting 34 at all.*

MR. RIVERS. Of course, if he has control over the fitness reports of the members he appoints as a result of the charges, after having gone to trial, then there might be some difference and I think there is some difference.

MR. LARKIN. It is a different concept.

MR. RIVERS. *But so far as referring the charges, I think it is entirely different as you have observed.*

MR. LARKIN. That is right. I do not think any witness has recommended to you that there be any difference or any change.

MR. GAVIN. I am sorry I was a few minutes late this morning. However, going back to article 33, to the matter of the officer exercising general court-martial jurisdiction, *that would still leave it in command control; would it not?*

MR. RIVERS. He is referring to charges at that point. *This is all pretrial.*

The House debate demonstrates that the subcommittee did not fully appreciate the importance of pretrial rights. As the chairman of the subcommittee, Mr. Brooks, pointed out, they could “spend weeks on this pretrial procedure without affecting a great many of the fundamental rights of the accused.”<sup>101</sup> Mr. Brooks reminded the subcommittee that this “all comes under pretrial proceedings—the vital thing in the bill is the trial, not the pretrial.” Moreover, it was not reversible error if it was not carried through, and it would not “affect the fundamental rights of the accused a great deal.”<sup>102</sup> If they could reach a decision on this issue, Mr. Elston reminded the committee members that they then had only one more article left before they could take up the trial procedures.<sup>103</sup>

The position of the national military establishment on the issue was clear. The commander should have the final say over the legal determination and the referral decision. The staff judge advocate would simply provide his opinion.<sup>104</sup> The debate “telegraphed” Congress’s willingness to go along. As Mr. Rivers pointed out, “[i]f the commanding officer has *some inkling* that there is a violation in the articles of this code, he has got to be able to find it somewhere down the line here. But the ultimate result of the trial is another matter, as

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MR. BROOKS. Gentlemen, an amendment has been suggested. If there is no further question in reference to the amendment, then the question is on the amendment.

(The amendment was agreed to.)

*Id.* at 474-477.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

I see it.”<sup>105</sup> (emphasis added). In the end, the amendment was adopted to clarify the language in draft article 34 to reflect a preference for the commander.<sup>106</sup> While Congress had not yet concluded the debate over “command control,”<sup>107</sup> Mr. Larkin highlighted for the subcommittee that the real issue was the commander picking the members, not the commander’s power to decide to refer charges to trial.

Weaknesses appeared under article 34 as drafted. If the staff judge advocate opined that a charge was not “sustained by evidence indicated in the report of investigation,” but the

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> 95 CONG. REC. 5718 (1949) (statement of Rep. Brooks, Chairman of a Subcomm. Of the House Comm. On Armed Services) ), *reprinted in* II Index and Legislative History to the Uniform Code of Military Justice, 1950 at 1563 (1985)

Perhaps the most troublesome question which we have considered is the question of command control. Under existing law commanding officers refer the charges in general, special, and summary courts martial and convene the courts; they appoint the members of the court, law officer for general courts and counsel for trial; and retain full power to set aside findings of guilty and modify or change the sentence, but are not permitted to interfere with verdicts of guilty nor to increase the severity of an sentence imposed. We have preserved these elements of command in this bill. On the other hand, we have included numerous restrictions on command. The bill provides that the convening authority may not refer charges for trial until they are examined for legal sufficiency by the staff judge advocate or legal officer;

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establishes a civilian court of military appeals, completely removed from all military influence or persuasion; and makes it a court-martial offense for any person subject to this code to unlawfully influence the action of a court-martial.

Able and sincere witnesses urged our committee to remove the authority to convene courts martial from command and place that authority in judge advocates or legal officers, or at least in a superior command. We fully agreed that such a provision might be desirable if it were practicable, but we are of the opinion that it is not practicable. We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations. Our conclusions in this respect are contrary to the recommendations of numerous capable and respected witnesses who testified before our committee, but the responsibility for the choice was a matter which had to be resolved according to the dictates of our own conscience and judgment. *Id.*

convening authority believed it was, the convening authority would not violate the statute if he referred the charge to trial.<sup>108</sup> Another weakness in the text of the draft article was the lack of an explicit, definitive standard of proof on the quantum of evidence necessary to refer a charge to trial by general court-martial.<sup>109</sup> The “warranted by the evidence” language

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<sup>108</sup> See *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. Of the House Comm. On Armed Services*, 81<sup>st</sup> Cong. 910-911 (1949) (Statement of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense), *reprinted in* I Index and Legislative History to the Uniform Code of Military Justice, 1950 at 379 (1985)

MR. SMART. Mr. Rivers, may I add right there, let us assume that the staff judge advocate to the convening authority advised the convening authority that there was no case made out as the result of pretrial investigation.

MR. RIVERS. That is right.

MR. SMART. And that the convening authority went ahead and convened the court in spite of that fact. It is my interpretation of this bill that after the case has been tried and the case then comes back to the office of the convening authority first the staff judge advocate must conduct a legal review of it. He has a second whack. And I say at that point, if he holds the record insufficient I do not think the commanding officer can sustain the case. *I think there he is locked. If not the first time, he is the second time.*

MR. RIVERS. Now there is where we ought to anticipate that trouble right off the bat, because you are bound to run into it.

MR. SMART. That is right.

MR. LARKIN. That is in article 34. The whole subject is treated there. *Id.*

Mr. Larkin was correct in his statement that the “whole subject is treated there” [in article 34], but he was incorrect in his unstated assertion that this hypothetical problem would be solved by article 34 on the front end. Article 34 would not prevent this problem from occurring because the staff judge advocate’s opinion “that there was no case made out as the result of pretrial investigation” was not binding on the commander. Moreover, the practicality of a post trial review by the staff judge advocate serving as a “second whack” would be even more unlikely given the nature of the relationship between the commander and his staff judge advocate. See discussion *infra* Part IV.B.2.b(4).

<sup>109</sup> See *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. Of the House Comm. On Armed Services*, 81<sup>st</sup> Cong. 712-713 (1949) (Statement of Col. Melvin Maas, National President of the Marine Corps Reserve Association), *reprinted in* I Index and Legislative History to the Uniform Code of Military Justice, 1950 at 180-181(1985)

COLONEL MAAS. On page 30, article 34, on line 23, after the word “evidence,” we suggest that you insert “beyond a reasonable doubt.” We think it is just a little too broad the way it is now: The convening authority shall not refer a charge to a general court martial for trial unless it has been found that the charge alleges an offense under this code and is warranted by evidence.” We think the evidence should be beyond a reasonable doubt.

MR. BROOKS. The same term is used in civilian trials.

amounts to no standard at all. This warning went unheeded as evidenced by the final version of article 34 that was passed into law.<sup>110</sup> This “standard” has since been adopted by the various service regulations that govern the conduct of military lawyers.<sup>111</sup> Such language would only serve to broaden the prosecutorial discretion of the convening authority. The

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COLONEL MAAS. Yes.

MR. PHILBIN. It would not be. In civilian courts it would be prima facie determination.

COLONEL MAAS. Well, you put no restriction or qualifying term on this one. You do not even call it prima facie evidence. You just say evidence.

MR. PHILBIN. I think if you want to conform it to civilian language you should make it prima facie determination.

COLONEL MAAS. Well, we will leave that to you gentlemen to work out. We think there should be some qualification. *Id.*

<sup>110</sup> Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107, 119 (1950)

ART. 34. Advice of staff judge advocate and reference for trial.

(a) Before directing the trial of any charge by general court-martial, the convening authority *shall refer* it to his staff judge advocate or legal officer for consideration and advice. The convening authority *shall not refer* a charge to a general court-martial for trial *unless he* has found that the charge alleges an offense under this code and *is warranted by evidence* indicated in the report of investigation.

(b) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence may be made. *Id.*

<sup>111</sup> Compare U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, p. 3 (1 May 1992) [hereinafter AR27-26 with AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT, Rule 3.8 (1995) (“The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by **probable cause**;”); accord AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, DR 7-103(A) (1992) (“A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by **probable cause**.”); see also AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9 (3d ed. 1993) (“(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by **probable cause**. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”)

Manual for Courts-Martial attempts to remedy this deficiency but does so in a hodgepodge manner.<sup>112</sup>

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<sup>112</sup> Compare MCM *supra* note 4, R.C.M. 406(b)(2):

(b) *Contents.* The advice of the staff judge advocate shall include a written and signed statement which sets forth that person's:

(2) Conclusion with respect to whether the allegations of each offense **is warranted by the evidence** indicated in the report of investigation (if there is such a report); (emphasis added)

The discussion accompanying the rule provides that "[t]he standard of proof to be applied in R.C.M. 406(b)(2) is **probable cause**." (emphasis added)

with MCM *supra* note 4, R.C.M. 601(d)(1):

(d) *When charges may be referred.*

(1) *Basis for referral.* If the convening authority finds or is advised by a judge advocate that there are **reasonable grounds** to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it.

The language "reasonable grounds" appears to be another way of saying "probable cause," and the analysis to the rule supports such a reading. See MCM, *supra* note 4, R.C.M. 601(d)(1) analysis, app. 21, at A21-30; *but see* MCM *supra* note 4, Preamble, ¶ 4, discussion:

The Department of Defense, in conjunction with the Department of Transportation, **has published supplementary materials** to accompany the Manual for Courts-Martial. These materials consist of a **Discussion** (accompanying the Preamble, the Rules for Courts-Martial, and the Punitive Articles), an **Analysis**, and various appendices. These supplementary materials **do not** constitute the official views of the Department of Defense, the Department of Transportation, the Department of Justice, the military departments, the United States Court of Appeals for the Armed Forces, or any other authority of the Government of the United States, and they do not constitute rules. Cf., for example, 5 U.S.C. § 551 (1982). The supplementary materials **do not** create rights or responsibilities that are binding on any person, party, or other entity (including any authority of the Government of the United States whether or not included in the definition of "agency" in 5 U.S.C. § 551(1)). Failure to comply with matter set forth in the supplementary materials **does not**, of itself, constitute error, although these materials may refer to requirements in the rules set forth in the Executive Order or established by other legal authorities (for example, binding judicial precedents applicable to courts-martial) which are based on sources of authority independent of the supplementary materials. (emphasis added).

For an argument that the "probable cause" standard is insufficient to protect the accused from the prosecutor's "awesome discretionary power to have a fellow citizen charged with a crime," and should be replaced with a "beyond a reasonable doubt" standard, see MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 218-223 (1990).

On the Senate side, the power of the commander to refer charges was also briefed as preeminent.<sup>113</sup> The true weakness in the bill was that the staff judge advocate's advice was not binding on the commander. Even were it binding, there was no guarantee that it would in practice afford the accused an important pretrial right by limiting the prosecutorial discretion of the convening authority.<sup>114</sup> In the end, article 34 was adopted as amended.<sup>115</sup>

## (2) The 1968 Amendments

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<sup>113</sup> See *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. On Armed Services*, 81<sup>st</sup> Cong. 39 (1949) (Statement of E. M. Morgan, Jr., professor of law, Harvard University), reprinted in I Index and Legislative History to the Uniform Code of Military Justice, 1950 at 929 (1985)

MR. MORGAN. Now, if this code is adopted, we will have the same procedure and the same substance governing all the services, and with a final authority as to the law, which is an authority for all three—a single, final authority. I think perhaps if I go through the procedure for a trial, and—I might say an accusation and a trial—it will give you an idea of the system the bill sets up.

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When the investigation is completed, if it is to be used as a basis for a trial, the investigation goes to the convening authority. The convening authority must consult with his staff judge advocate before he orders a trial. *It does not mean that he must necessarily follow the advice of the staff judge advocate. He may disagree with him, but he has to take the staff judge advocate's advice before he orders it for trial, and has to be convinced that an offense has been committed, and that there is a good case against the accused on the evidence that is indicated, although it may not be fully set forth in the investigation.* (emphasis added). *id.*

<sup>114</sup> See 96 CONG. REC. 1430 (1950) (letter to Sen. Morse from Mr. Arthur E. Farmer, of the firm of Stern Reubens, of New York City), reprinted in II Index and Legislative History to the Uniform Code of Military Justice, 1950 at 1821-1822 (1985)

Professor Morgan puts much faith in the fact that the appointing authority must always consult his staff judge advocate as to the framing of the charges and the available evidence before a trial is ordered. We do not share in his faith. Not only is the CG not bound by his staff judge advocate's recommendations, **but I know numerous instances in which the CG asked his staff judge advocate to change his recommendation, and, I am sorry to say, several instances in which the staff JA acceded to this request.** (emphasis added).

*id.*; see also discussion *infra* Part IV.C.3.

<sup>115</sup> See *supra* note 110.

The 1968 amendments to the UCMJ did nothing to amend article 34.<sup>116</sup>

### (3) The 1983 Amendments

The 1983 amendments to the UCMJ did touch upon article 34. The proposed bill submitted to Congress by the general counsel to the Secretary of Defense shifted the duty to make legal conclusions to the staff judge advocate and required that his advice be in writing.<sup>117</sup> These amendments were drawn to codify the reality of day-to-day practice as

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<sup>116</sup> See Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1331 (1968).

<sup>117</sup> For the draft version of the proposed legislation by the general counsel, Secretary of Defense, see *To amend chapter 47 of title 10, United States Code, (Uniform Code of Military Justice) to improve the quality and efficiency of the military judicial system reprinted in, Index and Legislative History to the Uniform Code of Military Justice*, (1983) at 181 (1984, 1985)

#### PRETRIAL ADVICE AND REFERRAL OF CHARGES

Sec. 4. Section 834 (article 34) is amended as follows:

(a) Subsection (a) is amended by striking out the second sentence and inserting in lieu thereof the following:

“The convening authority may not refer a charge to a general court-martial for trial unless he has been advised by the staff judge advocate—

“(1) each specification alleges an offense under this chapter,”

“(2) the charge is warranted by the evidence indicated in the report of investigation, if any, and”

“(3) a court-martial would have jurisdiction over the accused and the offense.”

(b) Subsection (b) is redesignated as subsection (c).

(c) The following subsection is inserted after subsection (a):

“(b) The advice of the staff judge advocate shall include a written and signed statement as to his conclusions with respect to each matter set forth in subsection (a). It shall also include a signed recommendation of the staff judge advocate as to the action to be taken by the convening authority. If the charges are referred for trial, the recommendation of the staff judge advocate shall accompany the charges.” *Id.*

contained in the Manual for Courts-Martial.<sup>118</sup> The Senate version differed initially in the respect that it permitted the staff judge advocate to give his advice *orally or in writing*.<sup>119</sup>

The focus of concern about the amendment was whether the advice should be in writing.<sup>120</sup>

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<sup>118</sup> For the sectional analysis of the proposed legislation by the general counsel, Secretary of Defense *see To amend chapter 47 of title 10, United States Code, (Uniform Code of Military Justice) to improve the quality and efficiency of the military judicial system reprinted in, Index and Legislative History to the Uniform Code of Military Justice, (1983) at 210 (1984, 1985)*

Section 4 amends Article 34 of the UCMJ to require that the convening authority receive written advice of the staff judge advocate before referral of charges to a general court-martial. The advice must contain conclusions as to whether each specification alleges an offense under the UCMJ, whether the allegation of each offense is warranted by the evidence in the investigation, and whether a court-martial would have jurisdiction over the accused and the offense. The Article 32 investigation may be waived by the accused, but the government may require such an investigation to be held regardless of such waiver. It is not necessary for the advice to set forth the underlying analysis or rationale for those conclusions. The requirement that the advice be in writing and accompany the charges if they are referred for trial reflects current practice as prescribed by paragraph 35c of Manual for Courts-Martial, 1969 (Rev. ed.). The amendments to Article 34 would replace the current requirement that the convening authority make a determination that the charge allege an offense and is warranted by the evidence. The requirements of this article will be binding on all persons administering the UCMJ, but failure to follow them will not constitute jurisdictional error. United States v. Ragan, 14 C.M.A. 119, 33 C.M.R. 331 (1963). *Id.*

<sup>119</sup> *See To Amend Chapter 47 of Title 10, United States Code (Uniform Code of Military Justice), To Improve the Military Justice System, and For Other Purposes: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. On Armed Services, 97<sup>th</sup> Cong. (1982) reprinted in, Index and Legislative History to the Uniform Code of Military Justice, (1983) at 239 (1984, 1985).*

<sup>120</sup> *See The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 97<sup>th</sup> Cong. (1982) (statement of Hon. Robinson O. Everett, Chief Judge, Court of Military Appeals) ) reprinted in, Index and Legislative History to the Uniform Code of Military Justice, (1983) at 336 (1984, 1985).*

With respect to pretrial advice under article 34 of the code preceding a trial by general courts-martial, we favor the simplification of the procedures and once again having the language, the letter of the law conform to the actual practice. Now currently the convening authority, a military commander, typically a layman, makes purportedly certain determinations of law. Obviously he relies very heavily on his Staff Judge Advocate, the trained lawyer who is assigned to him. With that in mind, we would suggest, as S. 2521 proposes, that the pretrial advice be in the name of the SJA himself, the Staff Judge Advocate. We of course believe that it should be in writing rather than oral.

Our philosophy on this is twofold. One, that it is cautionary. When you put something in writing, it is sort of a caution to you. You think about it a little bit more. Second, it is evidentiary. When it is writing, you know it is there. Now checklists are very commonplace in the military community as well as in business. Really by having written advice, all you are doing is saying here is a sort of checklist requirement, something that the Staff Judge Advocate has to do, has to think about and has to put in writing. *Id.*

The issue of whether it would actually afford an accused an important pretrial right was raised peripherally.<sup>121</sup> As proposed by the national military establishment, its purpose appeared geared toward eliminating the burden placed on the commander to make factual and legal determinations before he could refer charges to trial by general court-martial.<sup>122</sup> It was not viewed as a limit on the commander's prosecutorial discretion, but rather as recognition that these matters involved "complex legal determinations" that should rightly be made by a lawyer.<sup>123</sup> Article 34 as it exists at present is the result of the amendments made to it in 1983.<sup>124</sup>

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<sup>121</sup> See The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 97<sup>th</sup> Cong. (1982) (prepared statement of Eugene R. Fidell, on behalf of the American Civil Liberties Union) *reprinted in*, Index and Legislative History to the Uniform Code of Military Justice, (1983) at 454 (1984, 1985).

One provision of S. 2521 would permit the pretrial advice in general courts-martial to be furnished to the convening authority orally. The explanatory statement does not indicate the reason for this change, but I would assume that the purpose is to conserve processing time. Whatever the reason, this change would be extremely unfortunate. At least if the pretrial advice is reduced to writing, it would be possible at some later date for reviewing courts or officials within the Office of the Judge Advocate General to determine whether the advice was correct, and if not, whether the accused was prejudiced as a result. If the advice is not reduced to writing, an important safeguard will have been rendered useless. The ACLU opposes this change.

<sup>122</sup> See Letter from William H. Taft, IV, General Counsel, Department of Defense, to Thomas P. O'Neill, Jr., Speaker of the House of Representatives (12 Aug. 1982), *reprinted in*, Index and Legislative History to the Uniform Code of Military Justice, (1983) at 174 (1984, 1985)

Although the proposed legislation emphasizes changes in the appellate process, there are several other important aspects of the bill. The present requirement that the convening authority make certain factual and legal determinations before he can refer a case to a general court-martial is eliminated. Before he may refer a case to a general court-martial, however, he must be advised by his staff judge advocate that the law and the evidence provide a sufficient basis for the trial. The responsibility to refer the case to trial, however, will remain with the convening authority. *Id.*

<sup>123</sup> See S. Rep. No. 98-53 (1983) *reprinted in*, Index and Legislative History to the Uniform Code of Military Justice, (1983) at 542-543 (1984, 1985)

Section 4 amend Article 34 of the UCMJ to require that the convening authority receive written advice of the staff judge advocate before referral of charges to a general court-martial. The authority to refer cases to trial is a fundamental responsibility of commanders, and nothing in the amendments made by the Committee changes the convening authority's role in

#### (4) Article 34 in Practice

Other than the “accuser concept,” article 34 is the only “check” designed to work on the front-end. Even if viewed as a check, article 34 is imperfect. The staff judge advocate, like the subordinate commander, is subject to pressure from the chain-of-command. There is also no corresponding code provision that applies to trial by summary or special courts-martial.<sup>125</sup>

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this regard. Current law, however, requires that a commander, prior to referring a case to a general court-martial, must make specific legal determinations as to the legality of the charge, legal sufficiency of the evidence, and court-martial jurisdiction. These questions can involve complex legal determinations, and commanders normally rely on staff judge advocates for advice on such legal conclusions. The amendments to Article 34 will provide formal recognition of current practice, without any derogation of the commander’s prerogative to make a command decision about whether a case should be tried.

*id.*; If article 34 actually serves as a check on the commander’s prosecutorial discretion, it appears that it was actually an *unintended* consequence of the amendment. *see* The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 97<sup>th</sup> Cong. (1982) (statement of Col. John Jay Douglass (Ret.), Esq., Professor of Law, University of Houston, Judge Advocates Association) *reprinted in*, Index and Legislative History to the Uniform Code of Military Justice, (1983) at 501-502 (1984, 1985).

It seems to me that one of the most significant portions of this recommendation, both by your committee and by the Department of Defense is one that perhaps will not be given as much attention as it might, but it seems to me that you are changing an entire system of military justice in a sense. You are taking away from the commander the determination of legal matters. I have long suggested this. I have been a supporter of this move for a long time and I am glad to see it, but I think we should recognize what your are doing when you make this change.

There are going to be those who are later going to say you are taking away the rights of commanders. **We know, those of us who have been in the business, that in truth commanders don’t make legal decisions and they haven’t for at least 20 years that I am aware of.** They have been making discretionary decisions, the decisions you are going to leave to them. We recommend that you do make this change, but I hope everyone understands where we are really going. (emphasis added). *Id.*

<sup>124</sup> *See* Military Justice Act of 1983, Pub. L. 98-209, 97 Stat. 1393 (1983).

<sup>125</sup> *Compare* The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 97<sup>th</sup> Cong. (1982) (statement of Col. John Jay Douglass (Retired), Esq., Professor of Law, University of Houston, Judge Advocates Association) *reprinted in*, Index and Legislative History to the Uniform Code of Military Justice, (1983) at 502 (1984, 1985).

MR. PRINCIPI. Colonel, the vast majority of cases are tried by special courts-martial, I would believe, and there is no requirement for a legal writing of pretrial advice in that case, is there!

In those cases, the commander makes the pure legal determinations article 34 requires a judge advocate to make.<sup>126</sup> The text of the statute also provides little protection. It is difficult to think of a case where a staff judge advocate could *not* argue that “the specification is warranted by the evidence.” Any subsequent referral and conviction will bolster this determination. Any subsequent referral and acquittal will never bring the “improper” recommendation to light. After all, a finding of “not guilty” equates to “not proven beyond a reasonable doubt.”<sup>127</sup> It also fails to check a commander’s decision *not* to refer a case to trial

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COLONEL DOUGLAS. That is correct.

MR. PRINCIPI. Should there be in view of your comments?

COLONEL DOUGLAS. Well, I am concerned now about felony trials, and I have, frankly, for a long time looked at the special court as a place for nonfelony trials. I recognize that we try felonies now in the special court, but at least for those cases in which we are going to be considering with long-term confinement.

I think it would be a terrible thing, for example, to try a capital case and never to have had anything written about the legal evaluation of the evidence. Granted that I would go back this far. Perhaps I would go back to the special court and make such a requirement, but we know that many special court convening authorities do not have legal advisers, particularly in the Navy. So this would be placing an undue burden on them. *Id.*

<sup>126</sup> See MCM, *supra* note 4, R.C.M. 601(d)(1) analysis, app. 21, at A21-30

Subsection (1) requires a similar determination in all courts-martial, including special and summary courts-martial. Because of the judicial limitations on the sentencing power of special and summary court-martial, any judge advocate may make the **determination or the convening authority may do so personally**. (A special or summary court-martial convening authority does not always have access to a judge advocate before referring charges; moreover, **this subsection does not require reference to a judge advocate, even if one is available, if the convening authority elects to make the determination personally**.) (emphasis added).

<sup>127</sup> See *United States v. Schuller*, 17 C.M.R. 101, 109 (C.M.A. 1954) (Latimer, J., dissenting)

And perhaps when making his recommendation, the Staff Judge Advocate kept in mind the well-known principle that there is a difference between the burden of proof necessary to support a recommendation for trial and one to support a finding of guilt. Merely because the court-martial failed to convict on the charge of rape does not establish an improper recommendation on his part.

by court-martial in the case where the staff judge advocate confirms the presence of all three factors and recommends such a referral.<sup>128</sup>

The Court of Military Appeals has held from the outset that article 34 is an important pretrial protection for the accused.<sup>129</sup> While the legislative history of article 34 does not appear to support this view,<sup>130</sup> the Court of Military Appeals may have intended to make it so. In *United States v. Schuller*, the Court of Military Appeals drew support for this argument by relying on an opinion of the United States Court of Appeals for the District of Columbia Circuit in *Talbot v. United States ex rel. Toth*.<sup>131</sup> Toth was a civilian residing in the United States at the time he was charged by the Air Force for an alleged premeditated murder committed while he was stationed overseas as a serviceman in Korea. Then existing article 3(a) of the UCMJ continued to make Toth subject to trial by court-martial.<sup>132</sup> Toth's sister filed a writ of habeas corpus alleging, among other issues, that since he was a civilian when charged, he was entitled to due process of law in the civilian vice military sense. In

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<sup>128</sup> See generally HOMER E. MOYER, JR., JUSTICE AND THE MILITARY §3-300 (1972) (devoting a section to "Reverse' Command Influence: The Use of Command Authority To Assist The Accused").

<sup>129</sup> See *United States v. Schuller*, 17 C.M.R. 101, 104 (C.M.A. 1954)) (finding the legislative history contained at *supra* note 108 supports this proposition).

<sup>130</sup> See *supra* Parts IV.B.2.b(1), IV.B.2.b(3).

<sup>131</sup> See *Talbot v. United States ex rel. Toth*, 215 F.2d 22, 28 (D.C. Cir. 1954), *rev'd on other grounds*, *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

<sup>132</sup> Article 3(a) of the UCMJ then provided:

Subject to the provisions of article 43 [statute of limitations], any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or an State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

*Id.* at 25.

reversing the district court's decision to grant the writ, the Court analogized articles 32 and 34 of the UCMJ to the preliminary hearing protections afforded civilians by grand jury inquiry and indictment. Specifically, the Court held "[t]hat these provisions of the Uniform Code *seem* to afford an accused *as great protections* by way of preliminary inquiry into probable cause as do requirements for grand jury inquiry and indictment."<sup>133</sup> (emphasis added). The operative word in that holding is the word "*seem*." The United States Court of Appeals for the District of Columbia Circuit failed in its opinion to acknowledge important differences between the two—both theoretical and practical.

First, neither the recommendation of the article 32 investigating officer nor the recommendation of the staff judge advocate is binding on the convening authority.<sup>134</sup> The district attorney is bound by the grand jury's "no bill." The commander is not. He can still refer the case to trial so long as his staff judge advocate concludes that the "allegation of the offense is warranted by the evidence."<sup>135</sup>

The "protections" of article 34 also ignore the reality of military staff work. It defies common sense to believe that the first time a general court-martial convening authority will

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<sup>133</sup> Talbot v. United States *ex rel.* Toth, 215 F.2d 22, 28 (D.C. Cir. 1954) ), *rev'd on other grounds*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); *but see* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 218 n. 27 (1990) ("If the charge is made by a grand jury, the action, technically, is not the prosecutor's. As a matter of practical fact, however, the grand jury is the instrument of the prosecutor, and it is the rare grand jury that departs from the prosecutor's script. In the famous dictum of New York Chief Judge Sol Wachtler, a prosecutor could get a grand jury to indict a ham sandwich.")

<sup>134</sup> See UCMJ arts. 32, 34 (1998).

<sup>135</sup> See *supra* note 61 and accompanying discussion; *see also* United States v. Ayala, 43 M.J. 296, 313 (1995) (Wiss, J. dissenting)

Fact: The general court martial convening authority referred appellant's case to a general court-martial, notwithstanding the recommendations of both the special court-martial convening authority and the officer who conducted the hearing under Article 32, Uniform

have discussed a case with his staff judge advocate will be the same day his staff judge advocate drops off the referral package.<sup>136</sup> The commander may even have reached his own decision about disposition prior to receiving the statutorily mandated article 34 advice.<sup>137</sup>

In *United States v. Greenwalt*,<sup>138</sup> the Court of Military Appeals reversed the accused's general court martial conviction where the staff judge advocate had misled the convening authority in his pretrial advice. In that case, the article 32 investigating officer recommended trial by special court-martial and highlighted specific mitigating circumstances in the case. The staff judge advocate stated in his pretrial advice to the commander that the investigating officer recommended trial by general court-martial and that "there appears to be no

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Code of Military Justice, 10 U.S.C. § 832, that the case should be tried by special court-martial.

<sup>136</sup> See *United States v. Schuller*, 17 C.M.R. 101, 113 (C.M.A. 1954) (Latimer, J., dissenting)

I believe it a generally accepted practice in any military headquarters, or in most businesses, or even in appellate courts, to have responsible officials anticipate courses of action and direct what is to be done when they have crystallized. To do the usual is not so reprehensible.

The majority opinion sees to find something sinister in the fact that the convening authority was already familiar with the facts of this case prior to receiving the Staff Judge Advocate's advice. I disagree. A convening authority can keep abreast of developments and know what business is being transacted by his headquarters. I believe it good staff procedure to keep the commanding officer fully advised at all times. He need not receive his knowledge in one package, and there is nothing in the Code or the Manual which prevents him from accumulating knowledge over a period of time.

<sup>137</sup> Cf. *United States v. Schuller*, 17 C.M.R. 101, 106 (C.M.A. 1954)

On the other hand, if we look to the statement of the regular Staff Judge Advocate that he discussed the case with the Chief of Staff and knew the expectations of the convening authority, we find a disturbing intimation that the convening authority himself had determined to refer the charges to trial, without first finding, as required by Article 34(a), that the evidence indicated in the report of investigation warranted such action. The Staff Judge Advocate knew that on August 4 the convening authority "expected trial by general court-martial." However, the order directing an Article 32 investigation was not made until August 5, the report itself is dated August 6, and was forwarded on August 7.

<sup>138</sup> 20 C.M.R. 285 (C.M.A. 1955).

mitigating circumstances in favor of the accused.”<sup>139</sup> More telling about the case was the majority opinion’s observation about the importance of bringing such matters to the attention of the convening authority *before* referral. Judge Latimer, writing for the majority, stated that:

Once a general court-martial has been held, it is only remotely possible that a convening authority would disapprove the entire proceedings and cause the delay and expense attendant upon a second trial by an inferior court-martial. On the contrary, it becomes more likely that he would approve the entire proceedings, including the sentence imposed, in an effort to support the action taken by his staff officer, so long as that action was not patently outrageous.<sup>140</sup>

The court highlights that even if article 34 was written to serve as a check on the prosecutorial discretion of the convening authority, the realities of military life make it improbable that it will do so.<sup>141</sup> The military concept of “loyalty” runs both “up” and “down” the chain of command. Judge Latimer makes the case for the loyalty the commander feels to his staff judge advocate. Arguably, even stronger is the duty of loyalty owed by the staff judge advocate to his commander. The commander actually evaluates the staff judge advocate on this trait.<sup>142</sup> This trait of “loyalty” can serve as an impediment to doing what is “right.”<sup>143</sup>

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<sup>139</sup> *Id.* at 288. (“In his advice to the commanding officer, the staff judge advocate, *we assume inadvertently*, misstated the position taken by the investigating officer . . .”) *Id.* at 287.

<sup>140</sup> *Id.* at 290.

<sup>141</sup> *Id.* (“Even if the error was called to his attention he would not be apt to reverse the findings and sentence, as the concept that “*loyalty down breeds loyalty up*” is deeply ingrained in the military, and is, in almost all instances, a salutary one.” (emphasis added)).

<sup>142</sup> See e.g. U.S. DEP’T OF ARMY, REG 623-105, OFFICER EVALUATION REPORTING SYSTEM, para. 3-19 (1 Oct. 1997) [hereinafter AR 623-105] (listing “loyalty” as one of the “Army values” that the rater will evaluate and may comment on); U.S. MARINE CORPS, ORDER P1610.7E, PERFORMANCE EVALUATION SYSTEM, para. 4009.2b(3) (3 Dec. 1998) The highest evaluation for “leading subordinates” means that the individual rated

In the instance where the commander disagrees with the staff judge advocate's recommendation, the commander can "ask" the staff judge advocate to change his recommendation to comport with the commander's desires.<sup>144</sup> There is also the danger that the staff judge advocate who knows his commander's views from previous briefings about

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"[e]ngenders willing subordination, loyalty, and trust that allow subordinates to overcome their perceived limitations."

<sup>143</sup> See generally H.R. MCMASTER, DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT MCNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM 330-331 (HarperPerennial 1998) (1997) (Author argues that the "loyalty" the joint chiefs of staff felt to the President as commander-in-chief and to their own services prevented them from speaking out about what was the "right" thing to do militarily in Vietnam.); see also *supra* note 114 and accompanying text.

<sup>144</sup> See *supra* note 114; In the capital murder case of *United States v. Levell*, 43 M.J. 847 (N.M.C.C.A. 1996), the convening authority disregarded the recommendation of the article 32 officer and his staff judge advocate and referred the case "capital." At the article 32 investigation, the investigating officer asked the prosecutor whether he had any evidence to present of aggravating factors. The prosecutor indicated he did not. The article 32 officer thereafter in his report recommended that the premeditated murder charge be referred noncapital. The staff judge advocate made the same recommendation. The defense team heard second hand that after the convening authority reviewed the package and its indication of the absence of "aggravating factors," he remarked with words to the effect that "I'm pretty damn aggravated." The prosecution subsequently alleged two aggravating factors. The first factor was that the offense "was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered." (The victim was lying dazed on the ground when the accused fired a single .22 caliber bullet into the victim's chest.) The second factor was that "the accused then knew that the victim was in the execution of his office as a noncommissioned officer." (The incident occurred off base in a parking lot of a club at a Ramada Inn near Camp Lejeune. The victim was a Sergeant who had gone that evening to the club with some of his friends. The altercation began when one of the victim's friends got into an argument with the girlfriend of the accused.) The accused was convicted of premeditated murder but the findings were not unanimous. The members sentenced the accused to confinement for life and the same convening authority whom had referred the case capital, **disapproved** confinement in excess of 40 years. Telephone interview with Mr. Jeffrey Sanke, (individual military counsel for the accused at trial), Boston, Mass. (Mar. 31, 1999) ; Telephone interview with Mr. Steven Hammond, (detailed defense counsel for the accused at trial), Charlottesville, Va. (Mar. 31, 1999); The prosecutor in the case also remembers recommending that the case be referred noncapital but receiving the package back from the convening authority referred capital. Telephone interview with Mr. John Ladue (trial counsel), South Bend, Ind. (Mar. 31 1999).

the case<sup>145</sup> might color his own advice, even unknowingly, to coincide with those of his commander.<sup>146</sup>

In the end, even if article 34 worked as designed and removed all of the “complex legal decisions” from the commander, the systemic problem is placing prosecutorial discretion in the hands of the commander. It is not a matter that the commander is incapable of making the correct discretionary decision in referring charges to trial. After all, commanders make all sorts of discretionary decisions in areas where they are not the “duty experts,” and they routinely do this based upon the advice of their staff. Granted, in more technical areas where they have less formal training and experience, they are more apt to adopt the staff officer’s recommended course of action as their own. Arguably, a commander is more comfortable vetoing the G-3’s advice about a recommended scheme of maneuver for an upcoming operation than he is vetoing the brigade surgeon’s advice that his unit should be inoculated against a particular disease. Both decisions relate to the potential combat effectiveness of his unit. The decision to refer charges to trial is more akin to the brigade surgeon’s advice than

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<sup>145</sup> See *United States v. Schuller*, 17 C.M.R. 101, 103 (C.M.A. 1954) (Prior to preparing his article 34 advice letter, the staff judge advocate commented in a certificate attached to the pretrial advice that “I had already fully discussed the matter with the Chief of Staff, and knew that the Commanding General expected trial by general court-martial.”).

<sup>146</sup> Cf. *United States v. Sims*, 22 C.M.R. 591 (C.M.A. 1956) (The appellant was convicted at general court-martial for a 7-day unauthorized absence. He had two prior convictions for short periods (3 and 5 days) of unauthorized absence. His company commander forwarded the case by endorsement, recommending that no punitive action be taken but that the appellant be “administratively removed from the army.” The battalion commander concurred, indicated that board action was started, but also referred the appellant to a special court-martial. In the interim, the division commanding general held a commander’s conference and told his subordinate commanders that the AWOL rate of some battalions was high, that there were a number of repeat offenders, and that these soldiers could be given general courts-martial and removed from the Army with dishonorable discharges. The battalion commander’s superior attended this conference and returned the battalion commander’s endorsement with instructions that the appellant be tried by general court-martial. The article 32 officer recommended trial by special court-martial. The subject of the division commander’s conference became a fixed policy (“In all cases where an individual has been convicted two times for unauthorized absence, he will be tried by general court-martial upon commission of a third offense of unauthorized absence.”) *The staff judge advocate’s pretrial advice was dated the same day the policy became fixed* and the case was referred to trial the following day. *Id.*

it is to the G-3's advice.<sup>147</sup> Many commanders disagree believing that military justice is not a special skill unique to judge advocates.<sup>148</sup> Not only do they know enough about military justice based on experience to make the correct decision, they are keenly aware from "command experience" of the discipline that flows from such decisions.<sup>149</sup> Putting aside for the moment the debate about who is "best qualified" to make the decision, we must also examine who is "best insulated" from the effects of unlawful command influence to make the decision. The chain-of-command provides the ideal petri dish for this bacterium to grow.

### *C. Article 37(a)—Unlawful Command Influence*

#### *1. Background*

There can be no doubt that those who created our system of justice were concerned about the potential for command control over the process.<sup>150</sup> The unique nature of the military

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<sup>147</sup> See discussion *infra* Part II.A.

<sup>148</sup> See *infra* app. A, Survey Results of The March 2<sup>nd</sup> Resident Commanders' Program, Marine Corps University, Quantico, Virginia (2-5 Mar. 1999); see also *infra* app. B, Survey Results of The 152<sup>nd</sup> Senior Officers' Legal Orientation Course, The Judge Advocate General's School, Charlottesville, Virginia (25-29 Jan. 1999); (on file with author).

<sup>149</sup> See *id.*

<sup>150</sup> See *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986)

Command influence is the mortal enemy of military justice. Therefore, in the Uniform Code of Military Justice, Congress specifically prohibited such activity. Art. 37, 10 U.S.C. § 837; see also Art. 98, UCMJ, 10 U.S.C. § 898. Subsequently, the Military Justice Act of 1968 expanded the command-influence prohibitions of Article 37. Pub. L. No. 90-632, § 2(13), 82 Stat. 1338. Indeed, a prime motivation for establishing a civilian Court of Military Appeals was to erect a further bulwark against impermissible command influence. See Hearings on H.R. 2498 Before a Subcomm. Of the House Committee on Armed Service, 81<sup>st</sup> Cong., 1<sup>st</sup> Sess. 608 (1949)"); see also *United States v. Treagle*, 18 M.J. 646, 668 (A.C.M.R. 1984) (Yawn, J., concurring in part and dissenting in part) ("Unlawful command influence is unique and the dangers it poses are unparalleled. As a result, military appellate courts have long been sensitive to its nature and "pernicious effect not only on military justice but on discipline and morale as well. *United States v. Karlson*, 16 M.J. at 474 (citations omitted); *United States v. Olson*, *supra*; *United States v. Rodriguez*, *supra*. See also *United States v. Navarre*, 5 U.S.C.M.A. at 43, 17 C.M.R. at 43 (Brosman, J., concurring) (unlawful command influence is

community makes the mere threat of unlawful command control as dangerous as its actual presence.<sup>151</sup> The role of the commander in referring charges to trial by court-martial is particularly fraught with danger.<sup>152</sup> Under our current system, the potential accused must depend in large measure on the moral courage of the staff judge advocate and subordinate commander to resist such attempts. Current checks have not stemmed the tide.<sup>153</sup>

## 2. *Circumventing the Discretion of Subordinate Commanders*

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“a problem of such overwhelming importance in the scheme of military justice that it may be said to lie at the very core of the Code”). Thus, the Court of Military Appeals allows little “leeway” in the resolution of illegal command control matters. *United States v. Davenport*, 17 M.J. 242, 246 (C.M.A. 1984). *See also*, *United States v. Blaylock*, 15 M.J. 190, 193 (C.M.A. 1983).

*Id.* at 393.

<sup>151</sup> *United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990) (citing to HOMER E. MOYER, JUSTICE AND THE MILITARY, §3-400 (1972) quoted in *United States v. Rosser*, 6 M.J. 267, 273 n. 19 (C.M.A. 1979)

In a system of justice operating within a well-defined and fairly cohesive community, the mere threat of command influence may be as debilitating to the system as its actual presence. If respect for the justice system is a key factor in military morale and discipline, the fact that the system appears vulnerable to command pressures may be as damaging as the occasional exercise of such pressures. Individuals react to phenomena, after all, on the basis of their perceptions of those phenomena.

<sup>152</sup> *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986)

A commander who causes charges to be preferred or referred for trial is closely enough related to the prosecution of the case that the use of command influence by him and his staff equates to “prosecutorial misconduct.” Indeed, recognizing the realities of the structured military society, improper conduct by a commander may be even more injurious than such activity by a prosecutor. Likewise, as was perfectly clear to Congress when it enacted the Uniform Code of Military Justice and the Military Justice Act of 1968—and as the judges of the Court have always understood—command influence “involves ‘a corruption of the truth-seeking function of the trial process.

*Id.* at 394.

<sup>153</sup> *See generally*, Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 UCLA L. REV. 1 (1970) (tracing unlawful command control in courts-martial from 1775 until 1970).

“There is nothing improper with superior and subordinate commanders conferring on possible means of disposing of charges against a soldier, as long as the final recommendation comports with R.C.M. 401’s mandate that it be solely that of the recommending official.”<sup>154</sup> Juxtapose against this quote the following: “[t]he realities of military life are such that we can give little weight to a claim by a subordinate that he is not influenced by his commander’s views, particularly where they involve an assumption that the subordinate will act in a certain way.”<sup>155</sup> These two passages demonstrate that where a subordinate commander seeks the advice of his superior commander about the appropriate disposition of charges there is always a conflict of interest that may result in the actual breach of R.C.M. 401’s proscription. This conflict will not be limited to situations where the subordinate commander seeks the advice of his superior commander. The superior commander regularly supervises the activities of his subordinate commanders.<sup>156</sup> The subordinate commander will also brief the superior to keep him abreast of issues affecting the larger command.<sup>157</sup> Both of

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<sup>154</sup> United States v. Drayton, 39 M.J. 871, 875 n. 7 (A.C.M.R. 1994) (citing to United States v. Rivera, 45 C.M.R. 582, 584 (A.C.M.R. 1972)).

<sup>155</sup> United States v. Toon, 48 C.M.R. 139 (A.C.M.R. 1973) (en banc)

The thin line between command responsibility and judicial responsibility is difficult to draw. In an early case, Judge Latimer succinctly stated the problem: “In this type of case, we must differentiate between the virtues of command responsibility and the vices of command control.” (citing to United States v. Hawthorne, 22 C.M.R. 83, 90 (C.M.A. 1956))

<sup>156</sup> The Marine Corps uses the acronym “BAMCIS” as a mnemonic device to help Marines remember the six troop leading steps: **B**egin planning, **A**rrange for Reconnaissance, **M**ake Reconnaissance, **C**omplete the Plan, **I**ssue the Order, and **S**upervise. The last step is regarded as the most important. (emphasis added); *see also* United States v. Treake, 18 M.J. 646, 653 (A.C.M.R. 1984) (en banc) (“[E]ffective leadership requires a commander to supervise the activities of his subordinates diligently and ensure that state of good order and discipline which is vital to combat effectiveness.”).

<sup>157</sup> *See supra* note 160.

these truisms will inevitably lead to “unsolicited” advice on the handling of military justice matters.<sup>158</sup>

Rule for Court-Martial 401’s mandate cannot protect against the subtle pressure exerted, intentionally or unintentionally, through the chain-of-command. In the normal instance, this “401 discussion” occurs between a subordinate and the superior who writes the subordinate’s performance evaluation. This is not a conference among “equals.” One who seeks advice yet elects not to follow it runs the risk of repercussions ranging from a simple loss of confidence by the superior in the subordinate commander’s judgment to outright removal of the case by the superior commander.<sup>159</sup> While the dangers of “unlawful command influence” in this area are real, a violation of the proscription is difficult to establish.<sup>160</sup>

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<sup>158</sup> See Survey *supra* note 148 (questions 19-21) (indicating that a good number of commanders have felt pressure from superiors in their rating chain to dispose of a case in a certain manner, and that they believe that superiors consider their handling of disciplinary matters as an evaluative criterion).

<sup>159</sup> See MCM *supra* note 4, R.C.M. 306(a), 601(f).

<sup>160</sup> See *United States v. Villareal*, 47 M.J. 647, 658-666 (N.M.Ct.Crim.App. 1997) The appellant killed his best friend in a game similar to Russian roulette. Approximately three months after the shooting, the general court-martial convening authority entered into a pretrial agreement with the appellant that allowed him to avoid a murder charge and which suspended any confinement in excess of five years. *id.* at 659. The family of the victim wrote a 10-page letter critical of any pretrial agreement that would allow the appellant to avoid the murder charge. The letter was sent to the convening authority, senators, congressmen, senior military officials, and COMNAVAIRPAC. The convening authority discussed the controversial nature of the letter with “an old shipmate and friend,” who was then assigned as chief of staff, Commander, Naval Air Forces, Pacific (COMNAVAIRPAC). *id.* at 660. COMNAVAIRPAC was the convening authority’s reporting senior. The chief of staff was also serving as Acting COMNAVAIRPAC. The convening authority testified that he was unaware that COMNAVAIRPAC was out of town and that the chief of staff was Acting. “He was simply calling up his boss’ chief of staff and an ‘old friend and shipmate’ to keep him advised of the status of his command.” During the course of the conversation, the chief of staff posed the query: “what would it hurt to just send it to trial and let the members decide?” After discussing the case with the chief of staff, the convening authority decided to withdraw from the pretrial agreement. The convening authority testified that he did not perceive the chief of staff’s question as pressure to withdraw from the agreement. Nonetheless, to avoid concerns over possible unlawful command influence, the convening authority transferred the case to a geographically separate convening authority. Although the appellant was willing to enter into a new pretrial agreement on the same terms with the new convening authority, he was unable to do so. On appellant’s unlawful command influence motion, the court ruled that transferring responsibility for the case purged any possible taint. Yet, the court was not convinced that the transfer of the case “fully rectified the specter of apparent unlawful command influence in the eyes of practitioners of military justice or the American public in

### 3. *The Staff Judge Advocate as a "Principal"*

The actual and perceived problem associated with the commander's power to refer charges to trial would not be "solved" by transferring the power to his staff judge advocate. It would merely shift the focus of the command influence concern from the commander to his staff judge advocate.<sup>161</sup> The courts have held that staff judge advocate actions have constituted unlawful command influence.<sup>162</sup> The staff judge advocate must also be concerned when giving advice to subordinate commanders. There is a danger that his advice

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general." *id.* at 666. The court therefore reassessed the sentence under its Article 66(c) powers and reduced the term of the appellant's confinement from 10 years to 7 years, 6 months; *see generally* United States v. Davis, 37 M.J. 152, 155-156 (C.M.A. 1993). The appellant was convicted of missing movement by neglect, provoking speech, drunk and disorderly conduct, and impersonating a noncommissioned officer. Appellant alleged that his immediate commander was unlawfully influenced by the brigade commander to dispose of the charges by court-martial. The immediate commander testified that he initially considered giving the appellant nonjudicial punishment. Ultimately he recommended a trial by general court-martial. The immediate commander first considered a BCD special court-martial for the missing movement charge because that was the "norm" in the division but when he saw the other charges, he thought a general court-martial was appropriate. The Court of Military Appeals affirmed the appellant's general court-martial conviction on what can best be described as conclusory findings of fact by the military judge. The court stated "there is nothing **in the record of this case** to persuade us to the contrary." *id.* at 156. (emphasis added).

<sup>161</sup> *Cf.* United States v. Guest, 11 C.M.R. 147 (C.M.A. 1953) In speaking out about the actions of the acting staff judge advocate in providing the President of the court-martial with legal precedent which was used by the members to overrule the law officer, the court stated:

[i]t is entirely possible that fervor and zeal for law enforcement prompted the ill-advised consultation, but lurking in the background is the possibility of reverting to the old concept **that command must control and those charged with offenses must be convicted.**") (emphasis added).

<sup>162</sup> *See* United States v. Hamilton, 41 M.J. 32, 37 (C.M.A. 1994)

Even though an SJA is neither a commander nor a convening authority, we have held that actions by an SJA may constitute unlawful command influence, because "a staff judge advocate generally acts with the mantle of command authority. (citation omitted)).

regarding the appropriate disposition of charges will be that of the superior commander or, at the very least, that it may be interpreted as such.<sup>163</sup>

Staff judge advocates serve as members of the special staff of the commander. These billets are the stepping stones to higher rank. The staff judge advocate is beholden to the commander in the sense that the commander (normally a general or flag officer) writes the performance evaluation of the staff judge advocate and rates him against other staff officers. There is one piece of advice that is universally heled by senior staff judge advocates in advising younger judge advocates about how to succeed in the billet of “staff judge advocate” to a commander. It is simply this: “do not become known as a ‘Dr. No’—find a way to do what the commander wants done.” This is by no means an admonition to break the law. There is a distinction, however, between what is legal, and what is the “right thing to do.”

The danger of the “Dr. No” theory to success can be illustrated by the Army Court of Criminal Appeals in *United States v. Treagle*.<sup>164</sup> In that case, a commanding general spoke to subordinate commanders and senior noncommissioned officers, and one of the issues he addressed was the subject of testifying on behalf of soldiers at court-martial. The staff judge advocate provided the general with a written summary of the legal topics that the general

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<sup>163</sup> *Id.* at 37. In this case, the allegation of unlawful command influence was that the staff judge advocate had unlawfully influenced the appellant’s commander to prefer charges against the appellant after the appellant’s company commander had imposed nonjudicial punishment for the same offenses.

We do not believe, however, that every instance of advice or expression of opinion by an SJA is attributed to his or her commander. We also do not believe that SJAs must be timid in expressing their views. SJAs frequently are asked for legal advice by subordinate commanders, and they are obliged to provide competent and candid advice. **It is incumbent upon SJAs, however, to make it clear when they are expressing the view of their commanders and when they are expressing their own legal opinions.** (emphasis added).

<sup>164</sup> *United States v. Treagle*, 18 M.J. 646, 649-650 (A.C.M.R. 1984) (en banc)..

wanted to speak to in the form of a "script." The staff judge advocate was also present at some, but not all, of the sessions at which the general made his remarks. The majority opinion in *Treacle* commented that the staff judge advocate "apparently foresaw no difficulties arising from the general's remarks, for he neither took nor recommended remedial action until early in 1983, after publication of the Division command Sergeant Major's letter."<sup>165</sup> What the court opinion may have overlooked was the possibility that the commander was determined to make the remarks, even over the objection of his staff judge advocate.<sup>166</sup> It would have been easy for the staff judge advocate to advise the commanding general not to address this subject when speaking to this audience. In what may have been an effort *not* to be labeled a "Dr. No," the staff judge advocate provided a "caution" in the

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<sup>165</sup> *Id.* at 651. The division command sergeant major's letter contained the statement that:

[N]oncommissioned Officers DON'T: . . . Stand before a court-martial jury or an administrative elimination board and state that even though the accused raped a woman or sold drugs, he is still a good soldier on duty.

<sup>166</sup> *Cf.* *United States v. Sheperd*, 25 C.M.R. 352 (C.M.A. 1958) (Latimer, J., concurring in the result)

In spite of the storm flags posted by the communications from The Judge Advocate General of the Army, which ought to have been sufficient to discourage a commander supporting an official experiment, the General was so personally interested in his cause that he refused to yield. For example, *Life Magazine*, a well-know periodical of national circulation, published an article entitled, "A General Thins His Ranks," in which it quoted General Watlington as saying, "I cannot and will not tolerate a fat soldier." *Life* described the program in the following manner:

When Maj. General Thomas Watlington took command of the 8<sup>th</sup> Infantry Division at Fort Carson, Colo. Last winter he looked over his 20,000 men and came to an appalled conclusion: too many of them were too fat for duty. Unless they slimmed down, he warned the fat soldiers, they would have to be left behind when the unit moved this fall to Germany. Most of the 822 men who were found overweight quickly lost enough excess poundage to stay on the roster. But this month 50 of them were still too heavy for the general and some were court-martialed for their failure to lose weight. A few protested to the White House, the Pentagon and their congressman, and legal officers overruled the general's approach because there is no Army regulation which makes fatness a crime. But the general did not give up. 'Every man must be a frontline soldier,' he ruled, and shifting his legal ground, said that some of his fat men would still face court-martial on charges of failing to diet as ordered." [*Life*, Volume 41, No. 11, at page 87, September 10, 1956. *See also* *Army Times*, April 19, 1953 (Eastern edition), pages 8, 10 column 1-2.]

summary of legal topics that the General wanted to discuss.<sup>167</sup> Even with the caution, there is still a problem with a non-lawyer attempting to deliver a legal message.<sup>168</sup> In trying to be a “can do” fellow, the staff judge advocate sometimes creates more problems.

*D. Article 98—Noncompliance with Procedural Requirements*

*1. The Improbability of Prosecution*

Prosecution of commanders under article 98 has the potential to serve as a true deterrent to the exercise of “unlawful command control” over the judicial process. In practice, there is a very strong argument that article 98 has absolutely no deterrent value on a commander’s exercise of unlawful command control over the judicial process.

Military authorities regularly point to article 98 as the deterrent and appropriate sanction for command influence. In theory, persons who violate the article 37 proscriptions against command influence may be prosecuted under article 98; in practice, that notion is ludicrous. In the years since the UCMJ was enacted in 1950, article 98 has had an extraordinary history of disuse.<sup>169</sup>

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<sup>167</sup> See Treacle, 18 M.J. at 649.

“c. CAUTION: These remarks don’t mean don’t testify for one of your soldiers or tell a subordinate not to testify. It is occasionally appropriate to seek a result that an otherwise good soldier will be placed under a suspended punitive discharge. If retention in the service is appropriate, maybe you’ve recommended the wrong level of disposition.

<sup>168</sup> *Id.* at 654.

The subtle and somewhat contradictory nature of the points in that paper resulted in a message which was simply too complex for successful transmission to a large audience via verbal comments. The resulting confusion was increased by the tone and demeanor the general projected and by the fact that on some occasions he omitted the cautionary comment recommended by his staff judge advocate.

<sup>169</sup> HOMER E. MOYER, JR., JUSTICE AND THE MILITARY §3-361 (1972)

There are a number of obstacles to the use of article 98 as a sanction for unlawful command influence. The commander as a “potential accused” controls the keys to the courtroom through his power of referral. A superior commander is unlikely to learn about a subordinate’s unlawful command influence unless (1) the case has been forwarded to him for action because the subordinate has been disqualified from acting in it, or (2) the subordinate commander’s prosecutor reports the subordinate commander’s misconduct to his superior.<sup>170</sup>

Even if the superior commander does learn about it, the system is not designed to address it. The conflicts in prosecuting “your own” are not easy to resolve. The military prosecutor is more dependent on the commander to accomplish his mission than is the district attorney on the police. While the district attorney’s office depends on the police to investigate crime, the military prosecutor must depend on the commander for much more.<sup>171</sup> The military justice process goes nowhere without the commander’s cooperation. As the system exists, article 98 not only asks the prosecutor to “bite the hand that feeds him,” it makes him ask permission first.

Absent extremely egregious circumstances, the conduct of the “overzealous” subordinate commander can also be “overlooked” for any number of reasons. In the individual case

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<sup>170</sup> The same loyalty issues between the commander and his staff judge advocate are equally applicable to the relationship between the commander and his prosecutor. See discussion *infra* Part IV.B.2.b(4).

<sup>171</sup> See MCM *supra* note 4, R.C.M. 301 (report of offense transmitted to the commander), 303 (power to order a preliminary inquiry), 304(b) (power to order pretrial restraint), 305(c) (power to order pretrial confinement), 306(a) (power to dispose of offenses), 401-407 (power to forward and dispose of charges), 405(c) (power to order a formal pretrial investigation of charges), 503 (power to detail members to courts-martial), 504 (power to convene courts-martial), 601 (power to refer charges to courts-martial), 604 (power to withdraw charges from courts-martial), 702(b) (power to order a deposition), 703(d) (power to authorize the employment of expert witnesses), 704(c) (power to grant immunity), 705(a) (power to enter into pretrial agreements), 706(b)(1) (power to order an inquiry into the mental capacity or mental responsibility of the accused), 1107-1109 (power to act on the findings and sentence).

where it occurred, the prosecutor may be able to prove that it did not affect the case.<sup>172</sup> “No harm, no foul” so to speak. Where the commander’s conduct has far reaching effects beyond the case at bar, the commander disqualifies himself and/or transfers cases for disposition across or up the chain of command.<sup>173</sup> In the instance where it adversely affected the case, the military judge will grants the accused some type of appropriate relief.<sup>174</sup> The accused gets a remedy and the military judge may reprimand the offending commander in the judge’s essential findings on the record.<sup>175</sup> The case at this point lacks “prosecutorial appeal” from the superior commander’s viewpoint. After all, the subordinate commander was seeking the “right result”—increased discipline in his command through the conviction and punishment of an alleged wrongdoer. Handing over the keys to the courtroom to a “military district attorney” would put “teeth” in article 98.

## 2. *The Deterrent Value*

The knowledge of the lack of prosecutions under article 98 is another factor in why it does not serve as a deterrent to “unlawful command control.”

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<sup>172</sup> See *United States v. Cruz*, 20 M.J. 873, 887-88 (A.C.M.R. 1985), *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987) (holding that once the defense meets its burden of producing sufficient evidence to establish unlawful command influence, the burden shifts to the government to disprove by “clear and positive evidence” (1) that the unlawful activity did not occur, (2) that the unlawful activity occurred but no party was improperly influenced, or (3) there was no prejudice to the accused.)

<sup>173</sup> *Cf. supra* note 4, R.C.M. 504(c); 601(c).

<sup>174</sup> See *United States v. Jones*, 30 M.J. 839, 854 (N.M.C.M.R. 1990) (holding where the government fails to rebut the allegation of unlawful command influence, the military judge must take whatever measures are necessary to ensure beyond a reasonable doubt that the findings and sentence are unaffected by it).

<sup>175</sup> See generally MCM *supra* note 4, R.C.M. 905(d).

[The commanding general] did ask me if it were not true that the worst that could happen would be to have the Court of Military Appeals reverse the decision and give him “hell.” I replied that this was true.<sup>176</sup>

As the above quote aptly points out, the worst that may happen in a commander’s eyes is that some years down the road the case is reversed. When the commander weighs this possibility against what he perceives to be “immediate benefits” to the discipline of his command if he exerts some type of “unlawful command control,” the risk may be worth taking.<sup>177</sup>

The risk is similar to the case of a military judge who refuses to hear an untimely defense motion. While the judge risks reversal on appeal for not entertaining the defense motion, he sends a strong signal in his circuit about untimely motions. The cost of future reversal in the “right” case is weighed against the present benefit that all future motions will be timely. The distinction between the judge’s action and the commander’s is that the commander’s action is unlawful.

Were the commander to probe even deeper into the system, the odds favor the risk of “unlawful command control” in the “right” kind of case. Command control must first be uncovered and proven—two very difficult tasks. There is still more escape routes for the commander. Those cases that do not result in either a sentence to a punitive discharge, or any part of a sentence which exceeds that which can be adjudged at a special court-martial, will not result in a verbatim record of trial.<sup>178</sup> In those cases, those who care to read about

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<sup>176</sup> HOMER E. MOYER, JR., JUSTICE AND THE MILITARY §3-361 (1972) (citing to affidavit of the staff judge advocate, Ft. Leonard Wood; record of trial, United States v. Dubay, 27 C.M.R. 411 (C.M.A. 1967).

<sup>177</sup> cite to Hess/law review article about those who were proud to exert uci

<sup>178</sup> See MCM *supra* note 4, R.C.M. 1103.

the misdeeds of the commander will not have an opportunity to do so. Only those cases that result in a sentence, *as approved*, of a punitive discharge or confinement for one year or more will even make it to the criminal courts of appeals.<sup>179</sup> Ironically, the same Code that creates the courts as a check on “unlawful command control” gives the commander an option to avoid the “check” by disapproving a portion of the sentence.<sup>180</sup>

#### *E. The Courts*

Review by the various courts of appeals only “works” *after* the unlawful command influence has occurred. By that time, damage has already been done to the system. When a decision is published,<sup>181</sup> the accused convicted at special court-martial may have served his confinement or be home on appellate leave. The commander who convened the court may also have moved on to a new billet or duty. Under these circumstances, if any relief has been granted, odds are better that the accused is the only person to learn about it. If a commander

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<sup>179</sup> See UCMJ art. 66 (1998).

<sup>180</sup> See UCMJ art. 60 (1998).

<sup>181</sup> On average, appellate review of a Navy-Marine Corps bad conduct discharge, uncontested special court-martial will be completed one year from date of trial. Appellate defense counsel for the Navy-Marine Corps Appellate Review Activity (NAMARA) are given an initial period of 120 days from receipt of a record of trial to file with the court. The first enlargement of 30 days is normally granted pro forma by the clerk of the court. A routine contested case will take anywhere from 18-24 months from date of trial until a decision is handed down by the Navy-Marine Corps Court of Criminal Appeals. Telephone interview with Major Michael R. Osborn, Appellate Defense Counsel, Navy-Marine Corps Appellate Review Activity, Washington, D.C. (Mar. 30, 1999); In the Army for calendar year 1998, the average time from receipt of a record of trial by the defense appellate division until filing with the court was 116 days for a guilty plea and 257 days for a contested case. Army appellate defense counsel for the Defense Appellate Division (DAD) are given an initial period of 60 days from receipt of a record of trial to file with the court. Two additional extensions of 60 days each are normally granted pro forma by the clerk of the court. Telephone interview with Lieutenant Colonel Adele H. Odegard, Deputy Chief, Defense Appellate Division, United States Army Legal Services Agency (Mar. 30, 1999); Air Force appellate defense counsel are given an initial period of 90 days from receipt of a record of trial to file with the court. The first enlargement of 60 days is normally granted pro forma by the clerk of the court. Telephone interview with Captain Thomas R. Uiselt, Appellate Defense Counsel, Air Force Appellate Defense Division, Washington, D.C. (Mar. 30, 1999); *see also Courts-Martial Processing Times*, ARMY LAW., Dec. 1998, at 32 (providing average processing times for general and bad-conduct special courts-martial for actions taken at the local trial level until receipt by the clerk of the court of the Army Judiciary.).

is taken to task in a published opinion, chances are only the judge advocate community will read about it.

While vigilant in their fight to root out unlawful command influence, the courts have recently drawn a distinction based on the stage of the proceedings at which “unlawful command control” allegedly occurs.<sup>182</sup> These two stages—the accusatorial (pre-referral) stage and the adjudicative (post-referral) stage affect the analysis of unlawful command control issues. Accusatorial issues are now labeled as “defects” while adjudicative issues retain the label “unlawful command influence.” The significance of the distinction is that unlawful command influence issues are never waived on appeal, even when not raised at trial. The same does not hold true for “defects” in the referral process.<sup>183</sup> This new label placed on it by the courts does not make it any less of a problem. It does make it more difficult for the accused to seek meaningful relief. It also signals a retreat from the

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<sup>182</sup> See *United States v. Drayton*, 39 M.J. 871, 873 (A.C.M.R. 1994), *aff'd* 45 M.J. 180 (1996).

In *United States v. Bramel*, 29 M.J. 958, 967 (A.C.M.R.), *aff'd*, 32 M.J. 3 (C.M.A. 1990) (summary disposition) this court held that the reach of Article 37(a), UCMJ, extends only to the adjudicative processes of courts-martial, not to the accusatorial processes. While not so stating, *Bramel* in effect repudiates the broad sweep of the unlawful command control language found in *United States v. Hawthorne*, 22 C.M.R. 83 (1956)).

<sup>183</sup> See *United States v. Drayton*, 45 M.J. 180, 183-184 (1996) (Sullivan, J., dissenting)

The majority characterizes the coercion of a company commander (a captain) by a battalion commander (a lieutenant colonel) in the pre-referral process as a “defect.” 45 M.J. at 182. I call it unlawful command influence. The majority’s adoption of the Army Court’s “defect” approach to the pre-referral process pays lip service to this Court’s decisions in *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983), and *United States v. Johnston*, 39 M.J. 242 (C.M.A. 1994). In *Johnston*, this Court states quite clearly in the prereferral context that “[w]e adhere to the *Blaylock* rule: Unlawful command influence is not waived by a failure to raise it at trial.” *Id.* at 244. By now declaring that coercion at this stage of the proceedings is no longer to be considered unlawful command influence in violation of Article 37(a), the majority attempts to skirt the above rule. In the process, of course, it over turns another decision of this court, some 40 years old, without even mentioning it. See *United States v. Hawthorne*, *supra*. I note that Judge Wiss correctly recognized this stratagem in his separate opinion in *United States v. Hamilton*, *supra* at 40-41, and properly rejected it. I will not join in this judicial dismemberment of Article 37(a), the “sine qua non” of our military justice system.

“check”<sup>184</sup> Congress believed the courts would assert over commanders who abused their authority.

### *1. A Sampling of the Cases*

High profile cases provide unique problems relative to allegations of “word” being passed down the chain-of-command about an expected result.<sup>185</sup> On occasion, there is a case

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<sup>184</sup> See *United States v. Treakle*, 18 M.J. 646, 654 (A.C.M.R. 1984) (en banc).

[t]he statutory scheme and legislative history of the Uniform Code of Military Justice indicate to us that Congress endowed commanders described in Articles 22, 23 and 24 of the Uniform Code of Military Justice (citations omitted) with military justice powers intending that the Executive should determine who should exercise those powers. To check the exercise of these powers, congress endowed the courts created by the Uniform Code of Military Justice with the power to grant relief in individual cases where an abuse of command authority has taken place. We view this system as an integral feature of the balance struck by congress between command functions and the administration of military justice. (citations omitted).

<sup>185</sup> In *United States v. Ashby*, the defense raised an unlawful command influence motion asserting that the decision to court-martial Captain Ashby was passed down the chain-of-command by the President, the Secretary of Defense, the Commandant of the Marine Corps, and General Wesley Clark (CINCEUR) to the convening authority, Lieutenant General Peter Pace. (Captain Richard Ashby was acquitted on 4 March 1999 of all charges involving the deaths of 20 people when his EA-6B Prowler jet sheared ski lift cables in Italy and caused a gondola to fall to the ground). During the course of the motion litigation, the military judge directed that a set of interrogatories be served on the Commandant of the Marine Corps. The first set was served on 11 December 1998 and the Commandant's response was due back on 17 December 1998. In the interim, General Pace testified on the motion on 14 December and General Delong, who headed up the command investigation board, testified on 15 December. The military judge learned on 16 December from the court reporting shop that inquiries had been made from within the military law branch of the judge advocate division at Headquarters, Marine Corps for transcripts of the testimony of Generals Pace and Delong. Concerned about the possible impropriety of potential witness collaboration, the military judge sent an immediate electronic mail message to the Director of the Judge Advocate Division informing him about this matter and directing that these efforts cease. He also informed all parties about the matter on the record. The military judge subsequently ordered that a second set of interrogatories be served on the Commandant of the Marine Corps. The thrust of this set of questions was to determine what the Commandant had used to prepare his answers to the first set of interrogatories. All of this was recorded in the military judge's essential findings on the unlawful command influence motion. Ultimately, the military judge ruled that the convening authority, General Pace, exercised “unfettered independent discretion” in referring the case of Captain Ashby to trial by general court-martial. Telephone interview with Lieutenant Colonel Robert Nunley, Deputy Circuit Judge, Piedmont Judicial Circuit, Camp Lejeune, N.C. (Mar. 30, 1999); see generally, *United States v. Allen*, 31 M.J. 572, 593 (N.M.C.M.R. 1990)

A typical general or flag officer exercising convening authority power will almost always have superiors, higher ranking military officers or civilians in policy positions. These superiors as well must refrain from sending signals down the chain of command as to expected results in a criminal case. Real or perceived policy considerations in the operation of military departments have no place in determining the guilt or innocence of an individual charged with a crime under the laws of our land. Superior commanders and staff officers, as

where the subordinate commander has actually come forward to report that a superior commander compelled his recommendation about the appropriate disposition of charges.<sup>186</sup>

The more common cases are where a superior commander has announced or published a “policy” that improperly limits a subordinate’s discretion.<sup>187</sup> In light of *United States v.*

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well as military or civilian legal officers, must never, directly or indirectly, interfere with a convening authority’s exercise of his lawful duty. The convening authority must make his or her own decision on the case. It is not only unprofessional but a fraud on the system for a superior to “send the word” down to a convening authority as to a desired result in a criminal case which will please the leadership of our armed forces. (citations omitted).

*see also* *United States v. Calley*, 46 C.M.R. 1131, 1156-1157 (A.C.M.R. 1973) (holding the defense failed to meet its burden in establishing that the decision to prosecute was passed down the chain-of-command by the President, the Secretary of Defense, the Secretary of the Army, or General Westmoreland).

<sup>186</sup> *See, e.g., United States v. Hinton*, 2 M.J. 564, 56 (A.C.M.R. 1975) (holding that it was not necessary to decide whether a captain was actually compelled by his battalion commander to change his recommendation for disposition of the accused’s case in order to resolve the unlawful command influence issue. The captain’s testimony that he was ordered to change his personal recommendation was strongly disputed by an affidavit of the battalion commander submitted by the government on appeal. It was enough that the Captain changed his recommendation and felt compelled to do so, even if his beliefs were totally unfounded).

<sup>187</sup> *See United States v. Sims*, 22 C.M.R. 591, 594 (C.M.A. 1956) (finding Division commander’s policy that “[i]n all cases where an individual has been convicted two times for unauthorized absence, he will be tried by general court-martial upon commission of a third offense of unauthorized absence,” was improper); *see also United States v. Hawthorne*, 22 C.M.R. 83, 89 (C.M.A. 1956) (holding the commanding general’s published policy letter regarding the elimination of regular army offenders was improper.)

Two statements stand out in bold relief. First, the directive provides that consideration for elimination from the service “will be exercised in the following order.” At the very head of the list is trial by general court-martial. Plainly, therefore, the normal procedure for disposing of a charge by the lowest appropriate court-martial is ignored. Instead, the charges must uniformly be referred to the highest court. The second point of emphasis on command rather than suggestion is the statement that “any charge” will be referred to a general court-martial. The accused’s commander is deprived of his discretion. Even the most trivial offense must be referred to the highest court in the court-martial system. Necessarily, therefore, an offense in the twilight zone, such as the one in the present case, which might otherwise appropriately be referred to a special court-martial, is sent to a general court. In sum, the policy directive directly tended to control the judicial processes rather than merely attempting to improve the discipline of the command. It was, therefore, illegal. *Id.*

*cf. United States v. Toon*, 48 C.M.R. 139, 142-143 (A.C.M.R. 1973) (en banc) (holding that the convening authority improperly injected his policies into judicial proceedings thereby violating the basic rule permitting commanders to establish policy with respect to matters affecting discipline and morale within their units.) The convening authority published a letter in the Division magazine prior to the appellant’s sentencing proceeding on negotiated pleas relating to drug distribution offenses.

*Drayton*,<sup>188</sup> there may now be a question as to whether these “policy” cases actually involve unlawful command influence or will be categorized in the future as cases involving defects in the “pre-referral process.”<sup>189</sup> The commander’s decision to refer a case to trial may also have an unintended adverse effect on witnesses.<sup>190</sup> Finally, the Court of Appeals for the Armed Forces (CAAF) has now sanctioned what then Chief Judge Sullivan termed the “blackmail” option for those commanders who would engage in unlawful command influence. When “unlawful command influence” is uncovered by an accused, he may now use it as a negotiating tool to strike a favorable pretrial agreement.<sup>191</sup> As Judge Sullivan pointed out,

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Speaking to drug traffickers almost entirely from his vantage point as a general court-martial convening authority—and thus not solely as a commander—he announced unequivocally that he would not restore to duty anyone convicted of selling drugs; that he would require such a person to serve his sentence at the disciplinary barracks, ‘and your punitive discharge will stand.

<sup>188</sup> *United States v. Drayton*, 45 M.J. 180 (1996).

<sup>189</sup> *See supra* note 183 and accompanying text.

<sup>190</sup> *See United States v. Ayala*, 43 M.J. 296, 313 (1995) (Wiss, J. dissenting) Judge Wiss effectively marshals the facts to demonstrate the adverse affect on potential witnesses:

Fact: The general court martial convening authority referred appellant’s case to a general court-martial, notwithstanding the recommendations of both the special court-martial convening authority and the officer who conducted the hearing under Article 32, that the case should be tried by special court-martial. Fact: SPC Slack’s affidavit avers that, when he approached several of the named witnesses, their initial responses were quite positive about their willingness and ability to support appellant’s clemency appeal. Fact: Subsequently, these witnesses changed their minds, offering explanations like ‘good conscience’ precluded what earlier had been promised as a “strong letter” ; doing so “was not a wise career move.” Fact: Command contact via Command Sergeant Major (CSM) Bates was established in the instances of several of the witnesses in question. Fact: CSM Bates told Slack himself that Slack “was putting himself at risk career-wise by pushing things for PFC Ayala.” Fact: In declining Slack’s requests for support, appellant’s company commanders during and after Operation Desert Storm explained that doing so would be “inconsistent with the chain of command.” Fact: When appellant’s battalion commander, LTC Van Horn was solicited for help, he refused to “speak out against the chain of command.” .

<sup>191</sup> *See United States v. Weasler*, 43 M.J. 15 (1995) (Sullivan, Chief Judge, concurring in the result)

The command influence in this case (Captain Morris’ order to Lieutenant Hottman, soon to be the acting commander during her leave, to sign the charges—App. Ex. IX (motion to

this philosophical change subverts the overall integrity of the military justice system to “the private rights of an accused and a convening authority.”<sup>192</sup>

## 2. *The Difficulties of Proof*

Congress established the service courts and the now Court of Appeals for the Armed Forces as one of a number of “checks” on the commander’s power over the military justice system and the exertion of unlawful command influence.<sup>193</sup> As a prospective tool to combat this evil, they looked promising. In hindsight, the courts grant relief in only the most egregious of cases,<sup>194</sup> and then sometimes they fail.<sup>195</sup>

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dismiss)—is clearly the imposition of the influence of a senior over a junior in the preferral-of-charges stage under the Uniform Code of Military Justice) was not prejudicial in light of the entire record here. The majority today offers what at best can be described as a “blackmail type” option to those who would engage in unlawful command influence. Any accused who finds out about command influence can blackmail the guilty commander into giving him a lenient deal. In effect, this approach holds that the integrity of the military justice system, a major component in morale and discipline of our armed forces, may be subverted by the private interests of an accused and a convening authority. I strongly disagree. *See United States v. Kitts*, 23 M.J. 105,108 (C.M.A. 1986). Undercutting the UCMJ’s provisions against command influence brings us back to the old days of American military justice where the commander could do no wrong and the servicemember had few rights.

*see also United States v. Griffin*, 41 M.J. 607, 609-610 (Army Ct. Crim. App. 1994). A general court-martial convening authority issued a policy memorandum to subordinate commanders concerning physical training. Included in the memo was language that “[t]here is no place in our Army for illegal drugs or for those who use them.” The appellant’s case reached the convening authority after the memo had been published and then rescinded. After entering into a pretrial agreement, the appellant reserved the right to litigate the issue of unlawful command influence. The government then agreed to withdraw the drug charge and to amend the stipulation of fact to negate all reference to the appellant’s drug involvement. The court was satisfied that ‘the government’s complete capitulation regarding the drug charge eliminated any lingering appearance that the referral process was tainted by unlawful command influence.’

<sup>192</sup> *United States v. Weasler*, 43 M.J. 15 (1995)..

<sup>193</sup> *See supra* note 150 and accompanying text.

<sup>194</sup> *See discussion infra* Part IV.E.1.

Excepting the extraordinary writ,<sup>196</sup> they are limited by their statutory organization to a “damage control” role.<sup>197</sup> Even then, they can only reach a smattering of the cases involving unlawful command influence because they acknowledge that it is difficult to uncover in the first instance.<sup>198</sup> Even when it is uncovered, the courts have highlighted the difficulty of

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<sup>195</sup> A Major General was the convening authority for appellant’s general court-martial conviction for distribution of cocaine. After the appellant’s court-martial, the General authored an editorial concerning the problem of drugs aboard his installation. The editorial was entitled “Help Needed to Rid Drum of Evil Scourge.” While the entire text of the editorial is published in the opinion, a particularly pertinent paragraph reads as follows:

There is a slime that lives among us. It is a filth that is unspeakably sordid . . . a filth that should be flushed to a bottomless abyss where it will rot in its own stench forever. I refer to those unspeakables among us who sell drugs and attempt to corrupt our society and, as importantly, our youth. These criminals have no place in a free society . . . and should be removed from it.

The assistant division commander, a Brigadier General, was the acting commander and convening authority at the time the appellant’s court-martial was ready for action. He approved the sentence as adjudged. The appellant attacked the acting commander’s review of his sentence as being improperly influenced by the convening authority’s inelastic attitude toward drug offenses as stated in the convening authority’s editorial. The Army Court of Military Review was convinced based on the acting commander’s affidavit that the editorial in the post newspaper neither improperly influenced the acting commander nor affected his impartiality or ability to make an independent judgment. In his affidavit, the acting commander stated:

The Division Commander’s editorial in the post newspaper did not influence me, affect my impartiality, or my ability to take independent action in this case. My judgment alone as to what was an appropriate sentence in this case caused me to approve the sentence.

United States v. Cortes, 29 M.J. 946, 949 (A.C.M.R. 1990); *compare with* discussion *infra* Part IV.C.2.

<sup>196</sup> All Writs Act, 28 U.S.C.A. 1651(a) (West 1994).

<sup>197</sup> *See generally* UCMJ arts. 66-67 (1998).

<sup>198</sup> *See* United States v. Treakle, 18 M.J. 646, 667 (A.C.M.R. 1984) (Yawn, J., concurring in part and dissenting in part)

First of all, the evidence I have discussed came primarily from the determined efforts of trial defense counsel in their representation of other clients in other cases. This evidence was not easily gathered by them. Some witnesses who heard the General’s remarks initially were free and open when discussing with defense counsel their perceptions of the General’s lectures, but later became reticent after their supervisor or, in one case, the Staff Judge Advocate, talked to them. This problem was illustrated by a battalion commander who is said to have asked several defense counsel, “Why [are] a bunch of captains and majors . . . ganging up on a two star[?]” He also asked counsel why they were still pursuing “this matter,” and then

proving it.<sup>199</sup> Coupled with the difficulty in proving its existence<sup>200</sup> is the danger to the careers of those who help to bring it to light.<sup>201</sup> Where unlawful command influence is uncovered and proven, the specific and general deterrent effect of the decisions of the courts is questionable.<sup>202</sup> Each of these points weighs in favor of establishing a front-end check to prevent it from occurring. The “military district attorney” model can serve that purpose.

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somewhat cryptically said that what they were doing “was not in the best interests of all concerned.

*cf.* United States v. Griffin, 41 M.J. 607, 609 (Army Ct. Crim. App. 1994)

Further detailed questioning by the military judge revealed that, in preparing to litigate the issue of unlawful command influence, neither counsel had discovered any evidence that the commander’s memorandum had **actually infected** the referral, the selection of members, or chilled any potential witnesses. (emphasis added).

<sup>199</sup> See United States v. Karlson, 16 M.J. 469, 474 (C.M.A. 1983) (“[I]t is well established that unlawful command influence may assume many forms, may be difficult to uncover, and affects court members in unsuspecting ways.” (citations omitted)).

<sup>200</sup> Compare United States v. Ayala, 43 M.J. 296 (1995) and United States v. Stombaugh, 40 M.J. 208 (1994) (placing the burden of production initially on the accused to (1) allege sufficient facts to constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the proximate cause of the unfairness) with MCM *supra* note 4, MIL. R. EVID. 304(e) [Confessions and admissions] (“[w]hen an appropriate motion or objection has been made by the defense under this rule, the prosecution has the burden of establishing the admissibility of the evidence.”) and MCM *supra* note 4, MIL. R. EVID. 311(e)(1) [Evidence obtained from unlawful searches and seizures] (“[w]hen an appropriate motion or objection has been made by the defense under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, . . .”); see also Lawrence J. Morris, “This Better Be Good:” *Courts Continue to Tighten the Burden in Unlawful Command Influence Cases*, ARMY LAW., Apr. 1998.

<sup>201</sup> See United States v. Kitchens, 31 C.M.R. 175, 178 n. 3 (C.M.A. 1961) (Allegation of retaliation against a defense counsel who raised command influence); see also United States v. Treacle, 18 M.J. 646, 667 (A.C.M.R. 1984) (Yawn, J., concurring in part and dissenting in part) (“subordinates subjected to such pressures often are faced with conflicting concerns for their careers and the desire to do the right thing and may not be able to accurately discern the effects of their superior’s conduct.”) (citations omitted); *cf.* United States v. Youngblood, 47 M.J. 342 (1997) (courtmembers attended a staff meeting at which the Wing commander and staff judge advocate had shared their perceptions of how previous subordinate commanders had “underreacted” to misconduct. Members left the meeting with a clear impression that a fellow officer’s career was in danger due to the senior commander’s view the officer conduct in the particular case was the equivalent of shirking his duties.)

<sup>202</sup> See discussion *infra* Part IV.D.2.

## F. *Acquittal—Not a Check*

Acquittal at trial is not a sufficient “check” for the referral of cases to courts-martial that do not belong there in the first place. Such a view fails to take into account that “[t]o be formerly charged with a crime is, in itself, a punishing experience.”<sup>203</sup> In the end, the accused’s reputation always suffers.<sup>204</sup> The “not guilty” verdict equates to “not proven.” It does not equate to “innocent.”

## V. A Recent Attack on Our Commander’s Prosecutorial Discretion

### A. *The New Adultery Guidelines*

#### 1. *Two Systems of Justice?*

I think that it’s time now to look beyond Kelly Flinn. The issue involved is a much larger one than one particular person. It is whether or not there are clear standards, and whether there is selective enforcement in the military.<sup>205</sup>

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<sup>203</sup> MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS* 218-219 (1990) (1994)

The defendant’s reputation is immediately damaged, frequently irreparably, regardless of an ultimate acquittal. Anguish and anxiety become a daily presence for the defendant and for his family and friends. The emotional strains of the criminal process have been known to destroy marriages and to cause alienation or emotional disturbance among the accused’s children. The financial burden can be enormous. It may well include loss of employment because of absenteeism due to pretrial detention or time required away from work to attend hearings and the trial, or simply because the accused has been named as a criminal defendant. The trial itself, building up to the terrible anxiety during jury deliberations, is a torturing experience.

All that, and more, the prosecutor sets into motion simply by exercising the awesome discretionary power to have a fellow citizen charged with a crime. Expressing the idea that the government seeks justice, not convictions, it is said that the government wins its point even when a not-guilty verdict is returned. That is also true in a less idealistic, more cynical, sense: the prosecution wins even when the defendant is found innocent because, typically, the defendant will carry for life the severe wounds of his encounter with justice.

<sup>204</sup> *Id.*

<sup>205</sup> *Congresswoman Nita Lowey Holds News Conference with Other Congresswomen to Discuss the General Discharge of LT. Kelly Flinn from the Air Force*, FED. DOCUMENT CLEARING HOUSE, (May 22, 1997) (statement of Congresswoman Carolyn Maloney from New York).

In June of 1997, "Defense Secretary William Cohen announced three initiatives to maintain the effectiveness and readiness of U.S. military forces and to ensure that policies governing good order and discipline are clear and fair."<sup>206</sup> The third of the three initiatives "instructed the General Counsel of the Department of Defense to review the clarity of existing guidance on adultery under the Uniform Code of Military Justice."<sup>207</sup> The opening line of Secretary Cohen's memorandum to the DOD General Counsel was that "[r]ecent events suggest the need to review the clarity of existing guidance related to adultery under the Uniform Code of Military Justice."<sup>208</sup> Without listing those recent events, there were at the time a number of high profile military cases involving adultery that attracted significant media interest. The handling of the cases of Air Force Lieutenant Kelly Flinn, General Joseph Ralston, and Army Major General Joseph Longhouser were scrutinized in the media.<sup>209</sup> The "Pentagon's" treatment of these cases was criticized as evidence of a military justice double standard.<sup>210</sup> Adding fuel to the fire was the recall to active duty for trial of retired Army Major General David Hale. While it was alleged that Major General Hale had

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<sup>206</sup> *Secretary of Defense Announces Initiatives to Ensure Equity in Policies for Good Order and Discipline*, News Release, Office of Assistant Secretary of Defense (Public Affairs) (June 7, 1997) <[http://www.defenselink.mil/news/Jun1997/b06071997\\_bt296-97.html](http://www.defenselink.mil/news/Jun1997/b06071997_bt296-97.html)>.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See Michael Kilian, *Military Under Siege Over Sex, Morality Issue. While Air Force Gen. Joseph Ralston Remains a Potential Nominee for Chairman of the Joint Chiefs of Staff After Admitting an Affair, Army Maj. Gen. John Longhouser Quit his Post and Air Force LT. Kelly Flinn Was Ousted, at Least Partly Because of Adultery. Has this Become a Witch Hunt? Or is There A Double Standard at Work?*, CHI. TRIB., June 6, 1997, at 1.

<sup>210</sup> See *Pentagon Panels to Examine Adultery, Gender Issues*, CNN, (June 7, 1997) <<http://www.cnn.com/US/9706/07/military.sex/>> ("The armed forces have been hit by a spate of sex scandals, and the Pentagon has been criticized for a double standard that favors high-ranking officers, to the disadvantage of women and personnel of lower rank."). *id.*

improper sexual relationships with the wives of his subordinate officers,<sup>211</sup> he recently plead guilty to seven specifications of conduct unbecoming and officer and a gentleman and one specification of making false official statements.<sup>212</sup>

Secretary Cohen directed a review “of the applicable portions of the Manual for Courts-Martial, United States (1995 ed.), in particular, part IV, paragraphs 60 and 62.”<sup>213</sup> In response, the Department of Defense proposed changes to the Manual for Courts-Martial. These changes were the work product of the Joint Service Committee on military justice and a panel of senior attorneys within the Department of Defense and the Coast Guard.<sup>214</sup> The proposed changes were published in the federal register<sup>215</sup> for public comment and may eventually be sent to the President as a proposed Executive Order to be incorporated in the Manual for Courts-Martial.<sup>216</sup>

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<sup>211</sup> *Retired U.S. General Faces Hearing on Sex Charges*, CNN, (Mar. 13, 1999)

Hale retired abruptly in February 1998 in the midst of the highly publicized sexual misconduct court martial of Gene McKinney, former sergeant major of the army and the service’s highest-ranking enlisted man. McKinney was acquitted of the sexual misconduct charges, but the decision to allow Hale’s retirement opened the Army to criticism that it applied a double standard favoring commissioned officers over its rank and file.

<sup>212</sup> *See Rene Sanchez, Army Judge Reprimands, Fines General for Adultery, Lying*, WASH. POST, MAR. 18, 1999, at A8.

<sup>213</sup> *Secretary of Defense Announces Initiatives to Ensure Equity in Policies for Good Order and Discipline*, News Release, Office of Assistant Secretary of Defense (Public Affairs) (June 7, 1997) [http://www.defenselink.mil/news/Jun1997/b06071997\\_bt296-97.html](http://www.defenselink.mil/news/Jun1997/b06071997_bt296-97.html); Paragraph 60 deals with the “general article” which prohibits “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital.”<sup>213</sup> Paragraph 62 deals with adultery. *See MCM, supra* note 4, pt. IV, ¶ 60, 62.

<sup>214</sup> *Id.*

<sup>215</sup> 63 Fed. Reg. 43,687 (1998).

<sup>216</sup> *See generally* Department of Defense News Briefing, Office of the Assistant Secretary of Defense (Public Affairs) (Jul. 29, 1998) (statement of Ms. Judith Miller, General Counsel, Department of Defense).

The thrust of the proposed changes is to provide additional guidance (translation: “prosecutorial guidelines”) to commanders in the proper exercise of prosecutorial discretion with regard to the offense of adultery.<sup>217</sup> The guidelines list a number of non-exclusive factors to help commanders determine when an act of sexual intercourse between an unmarried service member and the spouse of another (or a married service member and a person not their spouse) is “prejudicial to good order and discipline” or “of a nature to bring discredit upon the armed forces.”<sup>218</sup> The proposed guidelines represent the first foray into

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<sup>217</sup> See generally *Hearings On the Implications of Adultery in the Military Before the Subcomm. on Oversight of Government Management, Restructuring and the District of Columbia of the Senate Comm. on Governmental Affairs*, \_\_\_ Cong. \_\_\_ (1998), FED. DOCUMENT CLEARING HOUSE, INC. (Oct. 7, 1998) (statement of Sen. Brownback) (“I talked with Secretary Cohen about these proposed changes when they were being rumored and then when they were put forward. And Secretary Cohen said to me that there are no changes that are taking place, that this is to standardize to provide greater clarity to people looking to enforce these adultery standards.”); see also Department of Defense News Briefing, Office of the Assistant Secretary of Defense (Public Affairs) (Jul. 29, 1998) (statement of Vice Admiral Dennis Blair, Director of the Joint Staff)

What, to me, is very important about what the Secretary has done is by laying out these number of new factors that commanders should consider when they’re dealing with these cases, you really give a distillation of the wisdom of the many people who have dealt with them over time into a place so it gives the commanders some help to make his or her decisions. I would have been grateful for that as a commander at the time that I had to deal with it. The particular case that I dealt with ended up in Admiral’s mast, a very serious form of non-judicial punishment. And the extra assistance that we’re now going to be giving in the Manual for courts-martial I think will help—would have helped me and will help our commanders in the future. *Id.*

<sup>218</sup> 63 Fed. Reg. 43,687 (1998).

Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether adulterous acts are prejudicial to good order and discipline or are of a nature to bring discredit upon the armed forces:

- (a) The accused’s marital status, military rank, grade, or position;
- (b) The co-actor’s marital status, military rank, grade, and position, or relationship to the armed forces;
- (c) The military status of the accused’s spouse or the spouse of co-actor, or their relationship to the armed forces;
- (d) The impact, if any, of the adulterous relationship on the ability of the accused, the coactor, or the spouse of either to perform their duties in support of the armed forces;
- (e) The misuse, if any, of government time and resources to facilitate the commission of the conduct;

what was previously the commander's unfettered discretion to decide when to refer a case to trial. What is also notable about the guidelines is that they were culled from military case law that has developed over the years in this area.<sup>219</sup> Presumably, a military prosecutor would have already been familiar with them.

## VI. A New Model for the UCMJ—The “Military District Attorney”

As a solution to the problem, this article proposes the creation of the “military district attorney.” Under this model, the commander would retain the power to impose nonjudicial punishment for minor offenses under article 15, UCMJ, and to direct trial by summary court-martial. The accused can check abuses of both processes through his right of refusal. The commander's power to refer charges to trial by special and general courts-martial would be

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- (f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, sulfate as whether any notoriety ensued; and whether the adulterous act was accompanied by other violations of the UCMJ;
  - (g) The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;
  - (h) Whether the married accused or co-actor was legally separated; and
  - (i) Whether the adulterous misconduct involves an ongoing or recent relationship or is remote in time.

<sup>219</sup> *Id.* at analysis; *accord* Department of Defense News Briefing, Office of the Assistant Secretary of Defense (Public Affairs) (Jul. 29, 1998) (statement of Ms. Judith Miller, General Counsel, Department of Defense) (“I think that the point on the adultery work is that we have not done something new. What we’ve tried to do is explain better to our commanders and the staff judge advocates in the field in one spot in the Manual that ends up being changed as we’re proposing, to have a place to look specifically for guidance on how to figure out whether the third element of the offense—prejudicial to good order and discipline or Service detrimental—is fulfilled. And if you look at the proposal for publication, there are nine factors. Actually, there’s more than that. But there are a number of factors spelled out as being things that are relevant to that determination. And those factors are largely drawn from prior military justice practice and from case law that has dealt with—struggled with these issues in situations where the question arises after someone was court—martialed, did you in fact make out a case on the third element. So what we’ve just tried to do is put in one place, sort of in one stop shopping, for the commander in the field, the kind of distilled wisdom that people have developed over the years in this one area.”).

transferred to installation level “military district attorneys.” Incidental powers related to the power to refer charges to courts-martial<sup>220</sup> would also be transferred and appropriately divided among military judges, military magistrates, and the military district attorney.

#### *A. The Structure of the New Model*

##### *1. Qualifications*

The new model would transfer the power to refer charges to trial by special and general courts-martial from the commander to a “seasoned” service judge advocate in the grade of O5/O6. The district attorney would be a member of the same service as the commander to better account for the unique disciplinary customs and traditions of the separate services. To qualify for the job, the “military district attorney” would be required to have a demonstrated background in military justice. At a minimum, he would have served tours as both a prosecutor and a defense counsel.

##### *2. Organization*

The service judge advocate would serve as the district attorney for host and tenant commands assigned to a particular installation or geographic region. The district attorney would serve a fixed tour length of three to four years subject to removal only for misconduct.<sup>221</sup> The installation district attorney would report directly to a service wide, district attorney. The service wide district attorney would in turn report directly to the

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<sup>220</sup> See *supra* note 171.

<sup>221</sup> The UCMJ and Rules for Courts-Martial could be amended to add provisions regarding the removal of a “military district attorney” which are analogous to those dealing with the “investigation and disposition of matters pertaining to the fitness of military judges.” See *generally* UCMJ *supra* note 4, art. 6a; R.C.M. 109.

service judge advocate general. The installation district attorney would be carried administratively on the rolls of the local installation but would be under the operational control of the service wide district attorney. This hierarchy is similar to that used by the service judiciaries, but neither is this structure impervious to unlawful command influence.<sup>222</sup>

Prosecution teams would work directly for the district attorney and would no longer fall under the supervision of the staff judge advocate or director of a law center. Although it has not created the billet and powers of a "military district attorney," a model of this type of trial team organization is presently being used by the trial services organization of the U.S. Navy.

### *3. The Process*

The commander would retain the right and duty to conduct preliminary inquiries of misconduct committed within his unit.<sup>223</sup> The commander would forward the investigation of such incidents to the district attorney for action: (1) where he believed they were too serious to handle at his level, or (2) where he believed his punishment powers were inadequate. The district attorney would have the power to "reach down" into a unit and elevate a case above the jurisdiction of the commander.

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<sup>222</sup> See *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991) (holding that the accused was not prejudiced from unlawful command influence in the form of a letter from the chief judge of the Navy-Marine Corps trial judiciary to the circuit judge of the Transatlantic Judicial Circuit which expressed concern about lenient sentences for unauthorized absence offenses); Ideally, to further guard against unlawful command influence and messages being "passed down" the JAG chain of command, a separate promotion track might be established for district attorneys, military judges, and regional defense counsel. All three would have the requisite familiarity with the military justice system to serve competently in any of the three billets. Alternatively, the district attorney might serve notice that he was serving in his final tour, or that he was removing his name from consideration for further promotion.

<sup>223</sup> See MCM *supra* note 4, R.C.M. 303.

Final reports of criminal investigations by law enforcement agencies would be addressed to the district attorney with a copy provided to the commander. Commanders would also receive courtesy copies of ongoing formal criminal investigations to keep them abreast of incidents affecting their unit. This would allow them to take administrative measures to ensure the well being of their command.

The final decision about all referrals to trial by general and special court-martial would rest with the district attorney subject to appeal by the commander to the service wide district attorney. The installation district attorney's decision would be reviewed under an "abuse of discretion" standard. Results of article 15 proceedings would *not* be forwarded to the district attorney for review. Article 15 as written provides a "safety valve" in the event a commander disposes of a serious offenses "inappropriately" at nonjudicial punishment.<sup>224</sup> A telephone call to a "hotline" or an installation district attorney would bring such a case to light.<sup>225</sup> Before convening a summary court-martial, the commander would be required to consult with the district attorney. "Former jeopardy" would bar the future trial of an offense already adjudicated at summary court-martial.<sup>226</sup> This consultation will serve as a check on handling a serious offense at an inappropriate forum.

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<sup>224</sup> See UCMJ *supra* note 4, art. 15(f) (1998); see also MCM *supra* note 4 pt. V, 1e; accord United States v. Blaylock 15 M.J. 190, 193 n. 3 (C.M.A. 1983) (citing to United States v. Wharton, 33 C.M.R. 729 (A.F.B.R. 1963) "Of course, if the offense is "serious," the nonjudicial punishment does not bar prosecution.").

<sup>225</sup> See generally MCM *supra* note 4, R.C.M. 301(a) ("Any person may report an offense subject to trial by court-martial."); accord R.C.M. 307(a) ("Any person subject to the code may prefer charges.") The frequency of reports of "inappropriate" dispositions would likely increase since the commander would no longer control the power of referral.

<sup>226</sup> See UCMJ *supra* note 4, art. 44.

In case of an article 15 or summary court refusal, the package would be forwarded to the district attorney. In any case in which the district attorney declined to prosecute, the package would be returned to the commander for administrative measures as he deemed appropriate.<sup>227</sup>

#### 4. *Redistribution of those Powers Incidental to Referral*

It makes no sense to leave the power to convene courts-martial in the hands of commanders. If the district attorney is to refer a case to trial, it is appropriate that he also have the power to “call” for a court to be convened. Otherwise, a commander could thwart the efforts of a district attorney by delaying the convening of a court or exerting unlawful command influence over the selection of its members.<sup>228</sup> It is obvious that it would also be inappropriate for the district attorney to select the members. The Canadian or United Kingdom models provide a ready solution.<sup>229</sup>

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<sup>227</sup> See Memorandum on Ensuring the Good Order and Discipline Required for Effective Military Forces, from Rudy de Leon, Under Secretary of Defense, to William S. Cohen, Secretary of Defense (Jul. 29, 1998) (visited Feb. 6, 1999) <[http://www.defenselink.mil/pubs/go\\_d\\_usdpr07291998.html](http://www.defenselink.mil/pubs/go_d_usdpr07291998.html)>. (setting out a tiered approach to good order and discipline to curtail inappropriate or unprofessional relationships beginning with corrective action in the form of: oral and/or written counseling and reprimands, orders to cease, reassignment; adverse action in the form of: official reprimands, adverse fitness reports, nonjudicial punishment, separation/reenlistment denials, promotion/demotion, and culminating in court-martial.). The accused’s refusal of nonjudicial punishment and summary court-martial, and the district attorney’s concomitant refusal to prosecute the same at special court-martial does not tie the hands of the commander. The commander may administratively process an accused for separation based on the alleged misconduct. see U.S. DEP’T OF ARMY, REG 635-200, PERSONNEL SEPARATIONS ENLISTED PERSONNEL, ch. 14, (17 Sept. 1990) [hereinafter AR 635-200] (providing that soldiers may be processed for administrative discharge due to misconduct); U.S. MARINE CORPS, ORDER P1900.16D, MARINE CORPS SEPARATION AND RETIREMENT MANUAL, para. 6210.2, 6210.3 (27 June 1989) (providing that marines may be processed for administrative discharge due to misconduct).

<sup>228</sup> See generally Major Guy P. Glazier, *He Called for his Pipe, and He Called for his Bowl, and He Called for its Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998).

<sup>229</sup> See discussion *infra* Parts VI.B.1.a, VI.B.1.b(2)(c)(iii); see also Glazier *supra* note 228 at 94 (suggesting a computer model for the American courts-martial system).

Under this model, the commander would retain his power to order pretrial restraint and pretrial confinement. While he would retain the power to authorize “inspections and inventories,”<sup>230</sup> he would give up the power to authorize searches requiring probable cause.<sup>231</sup> The power to authorize a probable cause search would transfer to the military magistrate who already acts as a “neutral and detached officer” for purposes of reviewing the propriety of pretrial confinement.<sup>232</sup>

Except for summary courts, the commander’s power to forward and dispose of charges would now be limited as described in Rule for Courts-Martial 402. The power to order a formal pretrial investigation, inquire into the accused’s mental capacity, order depositions, employ expert witnesses, grant immunity, and enter and negotiate pretrial agreements would be transferred to the district attorney.<sup>233</sup> As a crime “victim,” the commander would be consulted for his views about any proposed negotiated pleas, but like any other “victim,” he would not have the final say.<sup>234</sup>

##### *5. The Commander’s Power of Clemency*

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<sup>230</sup> See MCM *supra* note 4, MIL. R. EVID. 313.

<sup>231</sup> See MCM *supra* note 4, MIL. R. EVID. 315.

<sup>232</sup> See MCM *supra* note 4, R.C.M. 305(i).

<sup>233</sup> See *supra* note 171.

<sup>234</sup> The various service victim/witness assistance programs provide the “victim” with a voice but not a veto regarding charging decisions, the imposition of restraint, and negotiation of pretrial agreements. *see generally*, U.S. DEP’T OF ARMY, REG 27-10, MILITARY JUSTICE, ch. 18, (24 June 1996); U.S. MARINE CORPS, ORDER 5800.15A, VICTIM AND WITNESS ASSISTANCE PROGRAM (3 Sept. 1997).

The commander would retain his powers of clemency<sup>235</sup> excepting the power to disapprove findings. The power to disapprove findings would give the commander a complete veto over the referral decision of the district attorney. Such a power would defeat the protections against “reverse unlawful command influence”<sup>236</sup> sought by the transfer of referral power from the commander to the military district attorney.

*B. Support for the New Model*

The power to convene courts-martial is a kind of nonnegotiable item as far as the services are concerned.... [T]he line officer would be rare indeed who would go along with the ABA proposal.... [A] court-martial was still regarded as a means by which discipline was furthered, and discipline was the

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<sup>235</sup> See *United States v. Fields*, 25 C.M.R. 332, 336 (C.M.A. 1958) (citing to *Hearings before House Armed Services Comm. on H.R. 2498*, 81<sup>st</sup> Cong. 1183-1184. In discussing the convening authority’s review power the following discussion between Congressman Brooks and Mr. Larkin, Assistant General Counsel, Office of the Secretary of the Defense, highlighted why the convening authority should be afforded such broad powers of review.

MR. BROOKS. He doesn’t have to read the record or anything else [sic]. He can just say disapproved and it is through.

MR. LARKIN. That is right. In the normal course of the review of the case he looks to its legality and the establishment of the facts and the appropriateness of the sentence and he shouldn’t approve anything that is wrong or illegal, but he can disapprove it if it is illegal, if it is wrong, and for any other reason.

MR. BROOKS. Or for no reason at all?

MR. LARKIN. Or for no reason at all.

MR. RIVERS. That is right.

MR. LARKIN. The classic case that I think General Eisenhower stated in his testimony before your subcommittee last year was that even though you might have a case where a man is convicted and it is a legal conviction and it is sustainable, that man may have such a unique value and may be of such importance in a certain circumstance in a war area that the commanding officer may say ‘Well he did it all right and they proved it all right, but I need him and I want him and I am just going to bust this case because I want to send him on this special mission.’

He has the right to do that. It is that free rein—all of which operates to the advantage of the accused--).

<sup>236</sup> See *supra* note 128.

cement that held the unit together. No commander would conceive of surrendering to some lawyer the power to decide whether a court-martial best suited the interest of his outfit's discipline.<sup>237</sup>

The responses of Marine Corps and Army commanders to a survey question querying their support for this proposed model **overwhelmingly** validate the preceding passage.<sup>238</sup> As subsequent sections of this article will point out, probing beyond their responses to this "ultimate question" lends some support for the new model.<sup>239</sup> We have for too long blindly, and uncritically, accepted the argument that to change the system otherwise would adversely affect military discipline. The time has come to reexamine critically this rationale offered in support of a commander's right to order to trial any person he believes guilty of an offense

### *1. Reforms in Other Countries*

The armed forces of the United Kingdom and Canada have already adopted versions of the "independent military prosecutor" model. Each had its own unique catalyst for change. In the United Kingdom, it was a court case and the violation of a treaty provision. In Canada, it was a military peacekeeping operation. This article will develop more fully the Canadian catalyst for change. The events of the Somalia operation that dramatized the need for change in the Canadian system provide more striking parallels for the call for change in our own.

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<sup>237</sup> WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 27, 28 (1973)).

<sup>238</sup> See *infra* app. A, Survey Results of The March 2<sup>nd</sup> Resident Commanders' Program, Marine Corps University, Quantico, Virginia (2-5 Mar. 1999); see also *infra* app. B, Survey Results of The 152<sup>nd</sup> Senior Officers' Legal Orientation Course, The Judge Advocate General's School, Charlottesville, Virginia (25-29 Jan. 1999); (on file with author).

<sup>239</sup> *Id.*

a. *The United Kingdom and the Case of Lance Sergeant Findlay*

In 1991, Lance Sergeant Findlay pled guilty at a general court-martial to charges of assault, making threats, and “conduct to the prejudice of good order and military discipline.”<sup>240</sup> His requests for sentence relief was denied in the course of “reviews” provided for by the British courts-martial system.<sup>241</sup> In May of 1993, he made an application for relief to the European Commission of Human Rights. The United Kingdom had ratified the Convention for Human Rights and Fundamental Freedoms in March of 1951.<sup>242</sup> Mr. Findlay complained that “he had been denied a fair hearing before the court-martial and that it was not an independent and impartial tribunal.”<sup>243</sup> In September of 1995, the Commission unanimously ruled in his favor.<sup>244</sup> The Commission held that the British court-martial system violated article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>245</sup> The European Court of Human Rights affirmed this ruling in February of 1997.<sup>246</sup>

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<sup>240</sup> The charges arose out of an incident that occurred while he was stationed in Northern Ireland. After some heavy drinking, he brandished a pistol, fired some shots, and threatened to kill himself and others. He was diagnosed as suffering from post traumatic stress disorder from, among other events, his experiences during the Falklands war. He was sentenced to two years in prison, reduction in rank to guardsman and a dismissal from the army. App. No. 22107/93, 24 Eur. Ct. H.R. 221 (1997).

<sup>241</sup> At the time, a service member had no right to appeal the appropriateness of his sentence only to a higher court. *see* J. W. Rant, Note, *The British Courts-Martial System: It Ain't Broke, But it Needs Fixing*, 152 MIL. L. REV. 179, 183 n.12 (1996).

<sup>242</sup> Judge Rant indicates that the Convention “provides a broad framework of basic guarantees of citizens’ rights and freedoms.” When the Commission finds a “breach” it can issue a “declaration for aggrieved persons” and can also provide for compensation. An applicant’s case is first heard by the Commission. It may next be referred to the full Court. The United Kingdom accepts that Court’s jurisdiction. *see* J. W. Rant, Note, *The British Courts-Martial System: It Ain't Broke, But it Needs Fixing*, 152 MIL. L. REV. 179, 182 (1996).

<sup>243</sup> 24 Eur. H.R. Rep. 221 para. 81 (1997) App. No. 22107/93 [hereinafter Commission]

<sup>244</sup> *Id.* para. 109.

<sup>245</sup> *Id.*; Article 6(1) in pertinent part provides:

The Commission's finding that the court-martial did not constitute an "independent and impartial tribunal" was predicated on the central role of the convening authority in the prosecution of a case.<sup>247</sup> Under the existing Army courts-martial system, the convening authority picked the charges, the type of court, and the members.<sup>248</sup> One commentator remarked that the Commission's holding that the convening authority was "... central to Mr. Findlay's prosecution and closely linked to the prosecuting authorities" was perhaps "overgenerous" to the system as it then existed.<sup>249</sup> This same commentator believed "that the convening officer was *not merely* closely linked to the prosecuting authority, *he was* the prosecuting authority...."<sup>250</sup> (emphasis added). The Commission found that due to the commander's central role in the court-martial process, the court-martial itself lacked independence.<sup>251</sup>

During the interim period between the rulings of the Commission and the Court, the Armed Forces Act of 1996 completely revamped the British court-martial process for the

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In the determination of . . . any criminal charge against him, everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal established by law . . . .

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, *reprinted in* ALESSANDRA DEL RUSSO, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 271 (1971).

<sup>246</sup> 24 Eur. H.R. Rep. 221 (1997).

<sup>247</sup> See Commission *supra* note 243 para. 97-99.

<sup>248</sup> Army Act, 1955, 3 & 4 Eliz. 2, ch. 18 §§ 84-90 (Eng.).

<sup>249</sup> Paul Camp, *Court Martial—An Independent and Impartial Trial?*, 148 NEW L. J. 1156 (1998).

<sup>250</sup> *Id.*

<sup>251</sup> See Commission *supra* note 243 para. 109, 112.

Army, Navy, and Air Force.<sup>252</sup> These amendments took effect in April 1997.<sup>253</sup> Under this new system, the role and functions of the commander as convening officer were abolished and were split into “three different bodies; the “higher authorities,” the prosecuting authority, and court administration officers.”<sup>254</sup>

The accused’s commanding officer now forwards criminal charges he has investigated but does not intend to try “summarily” (or for which the accused has elected trial by court-martial) to the “higher authority.”<sup>255</sup> The “higher authority” has a number of options available to him other than to refer the charges to the “prosecuting authority.”<sup>256</sup> The “higher authority” can refer the charges back to the commanding officer of the accused and direct dismissal or a stay of the proceedings. If the charge is capable of being tried summarily and the accused has not elected trial by court-martial, the “higher authority” can refer it back to the commanding officer for summary trial. Once charges have been forwarded to the “prosecuting authority,” he has complete discretion to pick the charges, the forum, and negotiate any pleas.<sup>257</sup> While he may consider the views of military commanders, the prosecuting authority or his subordinates make the final decision on how to conduct the case.<sup>258</sup> The “court administration officer” is located outside the chain-of-command and picks the

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<sup>252</sup> Armed Forces Act, 1996, ch. 46 (Eng.).

<sup>253</sup> *Id.*

<sup>254</sup> 24 Eur. H.R. Rep. 221 para. 52 (1997).

<sup>255</sup> *Id.* para. 53.

<sup>256</sup> Armed Forces Act, 1996, ch. 46, § 76, sched. 1, pt. 1 (Eng.).

<sup>257</sup> *See Camp supra* note 249.

<sup>258</sup> *Id.*

members for the court-martial once he has been notified that the “prosecuting authority” has preferred the charges.<sup>259</sup>

*b. Canada & The Somalia Experience*

In the spring, summer and fall of 1992, the United Nations, concerned about the breakdown of national government in Somalia and the spectre of famine there, sought international help to restore some semblance of law and order in Somalia and feed its starving citizens. Canada, among other nations, was asked to help. After months of planning and training, and after a change in the nature of the United Nations mission from a peacekeeping mission to a peace enforcement mission, Canadian Forces personnel, as part of a coalition of forces led by the United States, were deployed for service to Somalia, mainly in December 1992.<sup>260</sup>

During the deployment of Canadian troops, certain events transpired in Somalia that impugned the reputations of various individuals, Canada’s military, and the nation itself. Those events, by now well known to most Canadians, included repugnant hazing activities prior to deployment involving members of the Canadian Airborne Regiment (revealed through the broadcast of videotapes made by participants), the shooting of Somalia intruders at the Canadian compound in Belet Huen, the beating death of a teenager in the custody of soldiers from 2 Commando, an apparent suicide attempt by one of those Canadian soldiers, and, after the mission, alleged instances of withholding or altering key information. Those events, with the protestations of a concerned military surgeon acting as a catalyst, led the Government to call for this Inquiry. Ironically, a military board of inquiry into the same events was considered insufficient by the present Government because it was held in camera, and with much more restricted terms of reference. It was considered to fall short of Canadian standards of public accountability, and a full and open inquiry was demanded. Our overall conclusion, as the title of this report and the opening passages of this preface make clear, is simple: the mission went badly wrong; systems broke down, and organizational failure

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<sup>259</sup> *Id.*

<sup>260</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol1/v1c1e.htm>>.

ensued. Our report canvasses a broad array of issues and events to reach this unhappy result.<sup>261</sup>

These incidents gave rise to the Commission of Inquiry into the Deployment of Canadian Forces to Somalia. Its precept was “to inquire into and report on the chain of command system, leadership within the chain of command, discipline, operations, actions and decisions of the Canadian forces and the actions and decisions of the Department of National Defence in respect of the Canadian forces deployment to Somalia.”<sup>262</sup> On March 20, 1995, the Commission of Inquiry into the Deployment of Canadian Forces to Somalia began its work. The Honourable Justice Gilles Létourneau chaired the Commission. One of the areas it examined was the performance of Canada’s military justice system. The Commission submitted its report on June 30, 1997.<sup>263</sup>

In January of 1997, Canada’s Minister of National Defence convened a separate external advisory group chaired by the former chief justice of the Canadian Supreme Court, Brian Dickson. This group was known as the Special Advisory Group on Military Justice and Military Police Investigation Services. This advisory group was charged exclusively with examining Canada’s military justice system.<sup>264</sup> Their analysis of the Canadian military justice system revealed three conflicting themes:

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<sup>261</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol1/v1pree.htm>>.

<sup>262</sup> *Amendments to the National Defence Act*, The Press Room, Department of National Defence, Canada (visited Jan. 15, 1999) <[http://www.dnd.ca/eng/archive/dec97/ammend\\_b\\_e.htm](http://www.dnd.ca/eng/archive/dec97/ammend_b_e.htm)>.

<sup>263</sup> *Id.*

<sup>264</sup> See also *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justiefw.htm>>. (“The mandate of the Special Advisory Group

- “the authority of the chain of command versus the independence of investigations;
- *the absolute discretion of the commanding officer to lay charges versus the need for impartiality and transparency; and*
- the need for the swift administration of justice and discipline versus the rights of the accused.”<sup>265</sup> (emphasis added).

Because of these two reports, numerous recommendations were made to amend Canada’s National Defence Act and the Canadian military’s Code of Service Discipline. Both reports called for the establishment of an “independent director of military prosecutions.”<sup>266</sup> Both also recommended amending the National Defence Act to remove the power of the commander to refer charges to trial by court martial and to transfer it to an independent military prosecutor. To understand better the context in which these recommendations were made, it is first necessary to understand the then existing Canadian military justice system.

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[...] is to assess the Code of Service Discipline, not only in light of its underlying purpose, but also the requirement for portable service tribunals capable, with prompt but fair processes, of operating in time of conflict or peace, in Canada or abroad.”) *Id.*

<sup>265</sup> See *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie2.htm>>.

<sup>266</sup> See *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol5/v5c40be.htm>>. (Recommendations 40-19 through 40-22); see also *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie3.htm>>. (Recommendation 8).

## (1) The Canadian Military Justice System

### (a) Historical Background

The Canadian military justice system provides an excellent model for comparison as it is similar to our own, and shares the same historical roots and philosophies. Like the United States, Canada has a separate military justice system. “The Canadian military justice system is based on the military justice system of the United Kingdom.”<sup>267</sup> Until 1950, “British statutes governed military discipline in the Canadian Army and in the Royal Canadian Air Force (RCAF).”<sup>268</sup> Today, Canadian law governs it. Like our own Uniform Code of Military Justice, the “National Defence Act (NDA) first came into effect in 1950.”<sup>269</sup> “It amalgamated a number of Canadian and British statutes governing the three military services into a uniform disciplinary code.”<sup>270</sup> “[T]he main features of the system—types of offences, basic powers of trial and punishment—closely resemble the British system that formerly applied to the Canadian forces.”<sup>271</sup>

“The statutory basis for the Canadian system of military justice is set out in the National Defence Act (Parts IV to IX.1) and is known as the Code of Service Discipline. The Code:

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<sup>267</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol1/v1c7e.htm>>; compare discussion *infra* Part 0.

<sup>268</sup> *Id.*

<sup>269</sup> *Report on the Quasi-Judicial Role of the Minister of National Defence*, Special Advisory Group on Military Justice and Military Police Investigation Services, Department of National Defence, Canada, (visited Jan. 8, 1999) <<http://www1.cfcsc.dnd.ca/DicksonII/dicksonII.en.html>>.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

- sets out who is subject to the military justice system
- establishes military offences such as striking a superior, disobedience of a lawful command and absence without leave
- incorporates all offences under the Criminal Code, other federal statutes, and foreign laws
- establishes service tribunals for the trial of service offences—the summary trial and the court martial
- establishes a process for the review of findings and sentence after trial.”<sup>272</sup>

The Canadian military justice system differs from its civilian counterpart in both the “rules it sets out and the procedures it establishes for enforcing those rules.”<sup>273</sup> Philosophically, the need for a separate Canadian military justice system has been justified for the same reasons

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<sup>272</sup> *Amendments to the National Defence Act*, Department of National Defence, Canada, The Press Room (visited Jan. 15, 1999) <[http://www.dnd.ca/eng/archive/dec97/ammend\\_b\\_e.htm](http://www.dnd.ca/eng/archive/dec97/ammend_b_e.htm)>.

<sup>273</sup> See *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol5/v5c40be.htm>>.

The peculiar nature of the military justice system, as opposed to the civilian system, can be seen from two examples—the first dealing with rules, the second with procedures for enforcing those rules.

- Obedience to lawful commands is central to effective military operations. Showing cowardice in the face of the enemy is a serious offence under the Code of Service Discipline. There is no counterpart for this offence in civilian life, simply because civilian life is not premised on the need for unswerving obedience to a higher authority.
- Misconduct must be responded to quickly to preserve discipline in the military. The structure, operation and limits of the military justice system should all be designed to achieve the basic goals of military justice—discipline, efficiency and high morale—in order to achieve the mission in a way that is fair and seen to be fair. At the same time, the military justice system must protect the same core values as those protected by the civilian justice system. *Id.*

which support our own military justice system.<sup>274</sup> This need was revalidated in the Report of The Special Advisory Group on Military Justice and Military Police Investigation Services.<sup>275</sup> It was also revalidated by the highly critical Report of the Somalia Commission of Inquiry that examined, among other things, the weaknesses of the Canadian military

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<sup>274</sup> *Compare Regina v. G  n  reux* [1992] D.L.R. 4<sup>th</sup> 110, 135

The purpose of a separate system of military tribunals is to all the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.

*with Chappell v. Wallace*, 462 U.S. 296, 300 (1983)

The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting....[C]enturies of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns.

<sup>275</sup> *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie2.htm>>.

It is essential to have a military justice system which deals expeditiously, decisively and yet fairly with breaches of the Code of Service Discipline. For the purpose of military justice is not only to ensure discipline but also—and this must be emphasized—to do so in a way which encourages reform of the individuals concerned so as to return them to the performance of their duties as soon as possible. The need for an efficient and expeditious justice system is thus greater in the military than in civilian society. Commanding officers, especially in combat circumstances, cannot wait months or years before discipline is restored and justice done. *Id.*

justice system in dealing with events before, during, and after the deployment of Canadian forces to Somalia.<sup>276</sup>

(b) The Investigation Process

Military law requires a commanding officer or persons acting under his authority to investigate and report on any service offence that may have been committed by a person under his command. From the information gathered, the commanding officer, or persons authorized by him, determines if circumstances warrant the laying of a charge. The commanding officer has the authority to cause a warrant to be issued, to enable the search of a suspect's military quarters and personal property, and the seizure of evidence of the commission of service offences. While military law permits any competent or qualified person to be assigned the task of investigating an offence, it is normally the case that the expertise of Military Police is relied upon by commanding officers when the case involves anything other than a minor disciplinary infraction.<sup>277</sup>

(c) The Charging Process

The commanding officer has the discretion to dispose of offences committed by members of the unit. The different options available to the commanding officer are to take no action, to take administrative action, to lay or direct the

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<sup>276</sup> See *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol5/v5c40be.htm>>.

The Canadian military justice system should therefore parallel the civilian justice system unless there is clear justification for it to differ from the civilian system.

Justification for a different system can in fact be found in the goals of military justice, which reach significantly beyond those of civilian criminal justice. As with the civilian criminal justice system, the military justice system must seek to ensure public safety and the observance of important societal standards.

However, the military justice system is also designed to promote strict discipline, efficiency and high morale in the forces in order to achieve the military mission.

The military must be prepared on short notice to perform a demanding and dangerous task. Strict discipline is an essential tool for ensuring this preparedness. *Id.*

<sup>277</sup> *Id.*

laying of charges or to combine an administrative action with the laying of charges. He also has the authority to dismiss charges.<sup>278</sup>

Under the Code of Service Discipline, the commanding officer of the accused is the sole authority with discretion to “lay” charges.<sup>279</sup> “The laying of a charge is a ‘formal accusation that a person subject to the Code of Service discipline has committed a service offence.’ In practice, a charge is laid when it is done in writing, dated and signed by the commanding officer or an officer, or non-commissioned member authorized by the commanding officer to lay charges.”<sup>280</sup> The commander may elect to try the accused by summary trial. If the commander believes he has insufficient powers of punishment due to the seriousness of the offense or for some other reason elects not to handle the matter at summary trial, he will apply to a higher authority to convene a court martial.<sup>281</sup> The convening authority for a court martial is normally a commander of a command.<sup>282</sup>

#### (d) Types of Trial

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<sup>278</sup> *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie5.htm>>.

<sup>279</sup> *See Overview of Military Justice and Courts Martial Introduction*, Department of National Defence, Canada (last modified Jan. 8, 1997) <[http://www.dnd.ca/eng/archive/oct97/cmartint\\_e.htm](http://www.dnd.ca/eng/archive/oct97/cmartint_e.htm)>.

<sup>280</sup> *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie5.htm>>.

<sup>281</sup> *See supra* note 279.

<sup>282</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol1/v1c7e.htm>> (citing to QR&O, vol. I, article 1.02, and vol. II, article 101.01) (“A commanding officer is defined as (a) the officer in command of a base, unit or other element of the CF, (b) any other officer designated a CO by the chief of the defence staff, or (c) for disciplinary purposes, a detachment commander.”).

There are two kinds of trial in the Canadian system—summary trial and trial by courts martial. There are four types of courts martial. They are the general court martial, the disciplinary court martial, the standing court martial, and the special general court martial.<sup>283</sup> Summary trial is a rough equivalent of a combination of our own nonjudicial punishment and summary court-martial.<sup>284</sup> The Canadian general and disciplinary courts martial are “member tried” cases analogous to our own general and special court-martial.<sup>285</sup> The Canadian standing court martial is a vehicle that provides for a “judge alone” trial,<sup>286</sup> and the special general court martial is a forum designed to try charges against Department of Defence civilians when located outside of Canada.<sup>287</sup>

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<sup>283</sup> See generally National Defence Act, R.S.C., ch. N-5, §§ 163-178 (1985).

<sup>284</sup> See *id.*, §163, 164. Summary trials are generally conducted by an accused’s commanding officer. The commander may also delegate his powers to any officer under his command. The accused may be an officer cadet or a noncommissioned member below the rank of warrant officer. Superior commanders have the power to try certain officers and senior noncommissioned members. Examples of various powers of punishment include detention, reduction in rank, reprimand and fine. The purpose of summary proceedings is “to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency, in Canada and abroad, in time of peace or armed conflict.” see *Queens Regulations and Orders for the Canadian Forces*, ch. 108, § 108.02 (on file with author). The accused has a right to elect trial by court-martial with regard to certain types of offenses and to consult with legal counsel before making that election. see *id.* §§ 108.17, 108.18.

<sup>285</sup> See generally *supra* note 283 §§ 166-176. While the general court martial is composed of five officers, the disciplinary court martial is composed of three officers. Both forums may try any person charged with having committed a service offence. While a general court martial can award any punishment from a fine to imprisonment for more than two years, the maximum period of confinement that a disciplinary court martial can adjudge is two years. The disciplinary court martial also may not try an officer of or above the rank of major. see generally *Overview of Military Justice and Courts Martial Introduction*, Department of National Defence, Canada (last modified Jan. 8, 1997) <[http://www.dnd.ca/eng/archive/oct97/cmartint\\_e.htm](http://www.dnd.ca/eng/archive/oct97/cmartint_e.htm)>.

<sup>286</sup> See generally *supra* note 283 § 177. The standing court martial is an accused’s option for trial by a judge without members. The judge is called the “president,” he cannot try a civilian or an officer of or above the rank of colonel, and he must be senior to the accused. see generally *Overview of Military Justice and Courts Martial Introduction*, Department of National Defence, Canada (last modified Jan. 8, 1997) <[http://www.dnd.ca/eng/archive/oct97/cmartint\\_e.htm](http://www.dnd.ca/eng/archive/oct97/cmartint_e.htm)>.

<sup>287</sup> Interview with Lieutenant Colonel J. C. Holland, Assistant Judge Advocate General (Atlantic Region), Canadian Forces, in Charlottesville, Va. (Mar. 2, 1999); see also *supra* note 283 § 178. Subject to certain regulations governing trial by courts martial, the provisions relating to conviction, sentence, and punishment for trial by general court martial apply equally to the special general court martial. This is the forum to try A special general court martial consists of a person who is or has been a judge of a superior court in Canada or is a

(2) Somalia—What Went Wrong with the Military Justice System

On the night of March 16-17, 1993, near the city of Belet Huen, Somalia, soldiers of the Canadian Airborne Regiment beat to death a bound 16-year-old Somali youth, Shidone Arone. Canadians were shocked, and they began to ask hard questions. How could Canadian soldiers beat to death a young man held in their custody? Was the Canadian Airborne Regiment suitable or operationally ready to go to Somalia? Was racism a factor in improper conduct within the Regiment? Before long, Canadian media began to publicize accounts of other incidents involving questionable conduct by Canadian soldiers in Somalia. Major Barry Armstrong, surgeon to the Canadian Airborne Regiment, acting in fulfillment of his military duties, alleged that an earlier incident on March 4, 1993, where an intruder was shot dead and another wounded by Canadian Airborne soldiers, appeared to have been an execution-style killing. And so, other questions arose: *Were incidents in Somalia covered up and, if so, how far up the chain of command did the cover-up extend?* Did the Canadian Forces and the Department of National Defense respond appropriately to the allegations of cover-up? And perhaps most problematic of all, were the mistreatment of Shidone Arone and other incidents of misconduct caused by a few ‘bad apples,’ *or were they symptomatic of deeper institutional problems in the Canadian military at the time—problems relating to command and control, accountability, leadership, or training? If so, did these problems still exist?*<sup>288</sup>

(a) Problem: The Commander’s Power

The Commission thought it important to remind the reader that the “commanding officer is the central figure in the military justice system.”<sup>289</sup> His “discretion is pervasive,

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barrister or advocate of a least ten years standing. A Special General Court Martial may only try a civilian. A Special General Court Martial can award a sentence of a fine or imprisonment for more than two years

<sup>288</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol1/v1c1e.htm>> (emphasis added).

<sup>289</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol5/v5c40ae.htm>>.

overwhelming, and largely unfettered.”<sup>290</sup> Most troubling for the Commission were the conflicts that existed between his role as a commander and his role in the justice system.

(i) The Inherent Conflict in the  
Commander’s Power to Investigate

Throughout the deployment to Somalia, and particularly before the March 16, 1993, death of Shidone Arone led to sending Military Police to examine this and other incidents in theatre, incidents that should have been investigated were not investigated in a timely manner, or were not investigated at all.

Control of military investigations is concentrated in the hands of commanding officers who are responsible for operations and who also may be directly implicated in the incidents. These conflicts are inherent in the formal role and responsibilities of a commanding officer.<sup>291</sup>

(ii) The Inherent Conflict in the  
Commander’s Unbridled Prosecutorial  
Discretion

Read outside the context of the Somalia inquiry, the following passages from the Commission Report accurately assess the potential dangers of our own military justice system.

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<sup>290</sup> *Id*; see also *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justiefw.htm>>.

The commanding officer is at the heart of the entire system of discipline. By statute, regulation, custom and practice of the service, the commanding officer has been given the authority to investigate service offences, including the power to issue warrants, to search for evidence, to arrest and detain suspects, to lay or to have charges laid, and to conduct summary proceedings or recommend that the matter be disposed of by court martial. Where the commanding officer deals with the alleged offence summarily, he or she hears the evidence, decides upon guilt or innocence, and imposes the punishment. *Id*.

<sup>291</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol15/v5c40ae.htm>>.

The substantial unstructured discretion vested in commanding officers has diminished the effectiveness and fairness of the military justice system. Leaving discretion to commanding officers—discretion over whether and how to investigate possible misconduct, and how to proceed if misconduct is uncovered—gives them the flexibility to apply appropriate measures to promote military discipline. At the same time, broad discretionary powers can lead to arbitrariness, unjustifiably harsh treatment of some individuals, much too lenient treatment of others and, in some cases, the complete avoidance of accountability for misconduct.

The commanding officer is not a peace officer, is not subject to a peace officer's oath of office or code of conduct, and has no overriding obligation to advance the administration of justice. In fact, the commanding officer's primary goal is to develop and maintain an effective and efficient unit. The commanding officer may also have less than laudable motives for applying discretion in one way or another. Disciplinary incidents within a unit may reflect poorly on the commanding officer's leadership ability. They may also limit future opportunities for the unit. The commanding officer may come to see his or her discretionary powers as a vehicle to soften the full impact of the military justice system or to manipulate the system for some personal goal.

Thus, the commanding officer may decide not to investigate a matter, or may refuse to take action, not because it serves the goals of the CF, but because it serves the commanding officer's more parochial interests. In other words, considerations that should not figure in the decision to investigate or prosecute—for example, the value of the offender to the unit and his or her personal history in the unit, the offender's rank, or the adverse impact of prosecution on subordinates who have become close comrades—can influence the commanding officer's use of discretion. And the exercise of that discretion occurs without political accountability or any form of public review.

In short, allowing commanding officers to bring inappropriate considerations into the exercise of their discretion damages the military justice system. *This is among the most significant systemic issues revealed by our examination of the military justice system in relation to the Somalia deployment.*<sup>292</sup> (citations omitted)

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<sup>292</sup> *Id.*

(a) A Result—The Double Standard—Two Different Systems of Justice: One for Those With Rank and One for the Rest

Several studies suggest that high ranking members enjoy preferential treatment in disciplinary matters. One report argues that significant numbers of CF members, especially those in the lower ranks, believe that the military justice system lacks fairness. Moreover, many junior non-commissioned members thought that the opinion of senior ranks was given disproportionate weight in complaints and grievances, particularly within units. These issues are not unique to the CF. In some other jurisdictions, officers tend not to be prosecuted for actions that would lead to the prosecution of those of lower rank.<sup>293</sup> (citations omitted)

(b) Recommendations for Reform

Both the reports of the Commission and the Special Advisory Group expressed “similar concerns with regard to the need for increased transparency, accountability and equality of application of military justice across the ranks.”<sup>294</sup>

The Commission’s recommendation for reform in this area was predicated on drawing a distinction between “minor disciplinary misconduct” and “major disciplinary and criminal misconduct.”<sup>295</sup> In the eyes of The Commission, the former would be left to the

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<sup>293</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol5/v5c40ae.htm>> (citing to n. 99).

<sup>294</sup> *Report on the Recommendations of the Somalia Commission*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/response/p2e.htm>>.

<sup>295</sup> See *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol5/v5c40be.htm>>. (Recommendation 40.1).

commanding officer.<sup>296</sup> The latter would be transferred to an “independent military prosecutor.”<sup>297</sup>

Under a restructured military justice system, the commander would investigate, prosecute, and adjudicate “minor disciplinary misconduct.” It was thought that this would allow him the flexibility “to apply appropriate measures to promote military discipline, efficiency and high morale.”<sup>298</sup> The Commission wanted to ensure that the prosecution or dismissal of a charge of minor disciplinary misconduct would no longer be a bar to criminal prosecution for the same misconduct.<sup>299</sup> The commanding officer’s disciplinary powers in this regard were analogized to those of professional bodies such as colleges of physicians and surgeons.<sup>300</sup> “Action by those bodies against individual misconduct does not preclude subsequent criminal prosecution for the same conduct.”<sup>301</sup> This would prevent commanders from choosing a lenient process “for dealing with misconduct, then relying on the doctrine of double jeopardy to prevent further disciplinary action and the imposition of more appropriate, and more severe, penalties.”<sup>302</sup> In this regard, the Canadian military justice system was subject to greater manipulation by commanders than our own because the

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<sup>296</sup> See *id.* (Recommendation 40.20).

<sup>297</sup> See *id.* (Recommendations 40.18, 40.19, 40.21).

<sup>298</sup> See *id.*

<sup>299</sup> See *id.*

<sup>300</sup> See *id.*

<sup>301</sup> See *id.*

<sup>302</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol5/v5c40ae.htm>>.

dismissal of charges by a commander would allow an accused “to assert the rule against double jeopardy.”<sup>303</sup>

The Commission believed that the deficiencies in the current military justice system could be addressed by establishing an independent military prosecutor who would decide whether to lay charges for major disciplinary and criminal misconduct.<sup>304</sup> It was thought that this would restrict the control of the process by commanding officers. The Commission believed that commanders had used this control in the past “to trivialize misconduct.”<sup>305</sup> The results of the investigation of these types of offenses would still be reported to the

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<sup>303</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol5/v5c40ae.htm>>. (recommendation 40.24 and accompanying discussion.); compare MCM *supra* note 4, R.C.M. 306(c)(1), discussion (“A decision to take no action or dismissal of charges at this stage [initial disposition] **does not bar** later disposition of the offenses under subsection (c)(2) through (5) of this rule”) and MCM *supra* note 4, R.C.M. 401(c)(1) (“When a commander dismisses charges further disposition under R.C.M. 306(c) of the offenses **is not barred.**”) with UCMJ art. 44(c) (1998) (“A proceeding which, after the introduction of evidence but before a finding, **is dismissed or terminated by the convening authority** or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article.” [former jeopardy]) (emphasis added).

<sup>304</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol5/v5c40ae.htm>>; see also *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie3.htm>> (“There is no shortage of models for an independent prosecution function within the military justice system. The JAG advises us that for courts martial the prosecution function has two essential requirements: first, it must be performed separately from the chain of command and, secondly, it must ensure the independence of the prosecution function and reduce potential conflicts of interest. We concur that a separate JAG office should be established with operational responsibility for all prosecutions before courts martial. Therefore: 8. We recommend the appointment of an independent Director of Prosecutions responsible to the Judge Advocate General.”).

<sup>305</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol5/v5c40ae.htm>>.

commanding officer<sup>306</sup> to permit him to “stay abreast of discipline problems within the unit.”<sup>307</sup>

(c) Reform Adopted in Canada

“In response to recommendations from the Special Advisory Group and the Somalia Commission of Inquiry, the government introduced amendments to the National Defence Act aimed at modernizing and strengthening the military justice system.”<sup>308</sup> Three areas of particular relevance to our own system of military justice are the changes suggested in the investigation and charging process, the creation of an independent director of military prosecutions, and the convening of courts-martial.

(i) Investigation and Charging

Amendments to the National Defence Act will

- remove from commanding officers the power to dismiss charges;
- require that a charge that is beyond the jurisdiction of commanding officers be referred to the Director of Military Prosecutions; and
- permit a charge to be referred to the Director of Military Prosecutions if a commander decides not to proceed with the charge.<sup>309</sup>

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<sup>306</sup> See *id.* (Recommendation 40.17).

<sup>307</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol5/v5c40be.htm>>.

<sup>308</sup> *Amendments to the National Defence Act*, The Press Room, Department of National Defence, Canada (visited Jan. 15, 1999) <[http://www.dnd.ca/eng/archive/dec97/ammend\\_h\\_e.htm](http://www.dnd.ca/eng/archive/dec97/ammend_h_e.htm)>.

<sup>309</sup> *Key Actors in the Military Justice System*, Department of National Defence, Canada, (visited Jan. 15, 1999) <[http://www.dnd.ca/eng/archive/dec97/actors\\_a\\_e.htm](http://www.dnd.ca/eng/archive/dec97/actors_a_e.htm)>.

Amendments to the Queen's Regulations and Orders for the Canadian Forces and administrative policies will

- establish a National Investigative Service (NIS), a specialized military police unit outside of the operational chain of command reporting directly to the Vice Chief of the Defence Staff through the Canadian Forces Provost Marshall;
- assign to the NIS the primary responsibility to investigate all serious and sensitive service offences to the newly established NIS;
- authorize investigators of the NIS to lay charges arising from their investigations, subject to the approval of the Director of Military Prosecutions; and
- require commanding officers to consult legal advisors in making investigation and charging decisions in respect of serious offences and to state reasons in writing where that advice is not accepted.<sup>310</sup>

(ii) Director of Military Prosecutions

The prosecution function, currently performed by the Office of the JAG, will be assigned exclusively to the Director of Military Prosecutions, who, acting under the general supervision of the JAG will:

- be responsible for the preferring of all charges to be tried by court martial and for the conduct of all prosecutions at courts martial;
- determine the type of court martial that should try an accused person on any charge that the Director prefers; and
- act as counsel for the Minister in respect of appeals under the National Defence Act.<sup>311</sup>

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<sup>310</sup> *Amendments to the National Defence Act*, The Press Room, Department of National Defence, Canada, (visited Jan. 15, 1999) <[http://www.dnd.ca/eng/archive/dec97/ammend\\_b\\_e.htm](http://www.dnd.ca/eng/archive/dec97/ammend_b_e.htm)>. Our own military justice system already has this protection in the form of three independent criminal investigative agencies: the Army Criminal Investigative Division (CID), the Naval Criminal Investigative Service (NCIS), and the Air Force Office of Special Investigations (OSI).

The Director of Military Prosecutions will act under the general supervision of the JAG who may issue general or specific instructions or guidelines in writing in respect of prosecutions. The Director of Military Prosecutions will be appointed by the Minister for a term not exceeding four years, renewable, and will be removable for cause on the recommendation of an inquiry committee.<sup>312</sup>

(iii) The Power to Convene Courts

“The authorities entitled to prosecute charges should, in effect, be the ones to trigger the convening of a court martial.”<sup>313</sup> This was the conclusion of the Special Advisory Group when they were tasked by the Minister of National Defence to additionally explore “the quasi-judicial role of the Minister in the military justice system as set out in the National Defence Act.”<sup>314</sup> The Group determined that the “role of convening a court martial is not, per se, a judicial or quasi-judicial function. Rather, it is an exercise of discretion power related to the prosecution of charges.”<sup>315</sup> The Group envisioned that once the independent Director of Prosecutions decided that charges would be referred to court martial, he would “request that the Chief Military Trial Judge convene either a General or a Disciplinary Court

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<sup>311</sup> *Key Actors in the Military Justice System*, Department of National Defence, Canada, (visited Jan. 15, 1999) <[http://www.dnd.ca/eng/archive/dec97/actors\\_a\\_e.htm](http://www.dnd.ca/eng/archive/dec97/actors_a_e.htm)>.

<sup>312</sup> *Id.*

<sup>313</sup> *Report on the Quasi-Judicial Role of the Minister of National Defence*, Special Advisory Group on Military Justice and Military Police Investigation Services, Department of National Defence, Canada, (visited Jan. 8, 1999) <<http://www1.cfcsc.dnd.ca/DicksonII/dicksonII.en.html>>.

<sup>314</sup> *See id.*

<sup>315</sup> *See id.*

Martial.”<sup>316</sup> The Chief Military Trial Judge would then assign a judge from his office to preside at the trial and “arrange for the selection of the members of the court.”<sup>317</sup>

(d) Implementation

At present, Canadian Forces operate under the “old system.” The amendments to the National Defence Act<sup>318</sup> proposed by both the Special Advisory Group and the Somalia Commission of Inquiry received “royal assent” on December 10, 1998.<sup>319</sup> The Canadian Forces are rewriting their regulations to establish procedures consistent with those amendments.<sup>320</sup> One notable change in “The Queen’s Regulations and Orders for the Canadian Forces” will be the expansion of the right of an accused to elect trial by court martial on *any* offense.<sup>321</sup> The office of the independent director of military prosecutions and regional prosecution offices have already been created and staffed in anticipation of the change.<sup>322</sup> The latest estimate is that the new system will take effect in September 1999.<sup>323</sup>

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<sup>316</sup> *See id.*

<sup>317</sup> *See id. Report on the Quasi-Judicial Role of the Minister of National Defence*, Special Advisory Group on Military Justice and Military Police Investigation Services, Department of National Defence, Canada, (visited Jan. 8, 1999) <<http://www1.cfcsc.dnd.ca/DicksonII/dicksonII.en.html>>.

<sup>318</sup> *See* An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts (Bill C-25), 46 Eliz. 2, ch. N-5 (1997) (Can.).

<sup>319</sup> Interview with Lieutenant Colonel J. C. Holland, Assistant Judge Advocate General (Atlantic Region), Canadian Forces, in Charlottesville, Va. (Mar. 2, 1999).

<sup>320</sup> *See id.*

<sup>321</sup> Telephone interview with Lieutenant Commander James Price, Deputy Director, Canadian Military Prosecutor’s Office, Ottawa, Canada (Mar. 31, 1999).

<sup>322</sup> *See id.*

<sup>323</sup> Telephone interview with Lieutenant Commander James Price, Deputy Director, Canadian Military Prosecutor’s Office, Ottawa, Canada (Mar. 31, 1999).

## 2. *Sharing the Same Values*

At first blush, the proposal to strip the commander of his powers to refer charges to trial by court-martial appears radical. When one takes the time to think about it, it is anything but radical. Judge advocates understand and share the commander's concern for discipline<sup>324</sup> in the unit regardless of any philosophical difference over whether the primary aim of the military justice system is discipline or justice.

The Army and Marine commanders who participated in the survey indicated that in those cases where they sought the advice of their legal advisor about the appropriate disposition of charges, they followed it in the vast majority of cases.<sup>325</sup> A majority of the respondents in the survey also believed that judge advocates understood and appreciated the importance of discipline to the commander in mission accomplishment.<sup>326</sup> There is no good reason then not to expect the military district attorney to understand, share, and appreciate the importance of the commander's need for discipline in his unit. It is likely that his charging decisions will reflect that concern. The fear of the loss of an ability to maintain good order and discipline within a unit with the transfer of referral power is unfounded.

One could argue that if the commander follows the advice of his legal advisor more often than not about the proper disposition of charges, then this proposed model elevates form over substance. The commander is already doing what the "district attorney" would do. Even were that the case one hundred percent of the time, exercising the proper prosecutorial

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<sup>324</sup> See Survey *supra* note 148 (question 18).

<sup>325</sup> See *supra* note 149. (questions 15-16).

<sup>326</sup> See *supra* note 149. (question 18).

discretion is only one facet of the problem. The form over substance argument ignores the structural problems in our system. The model goes the extra step in limiting the superior commander's ability to exert unlawful command influence over his subordinate's discretionary decisions. Without the structural reorganization, the "perception problems" that plague the appearance of the overall fairness of our system will continue.

Even if commanders do not personally believe that judge advocates share their values,<sup>327</sup> the systems in place to "grow" judge advocates instill those beliefs. The Marine Corps example best illustrates this point. Every Marine Corps officer attends the same "boot camp" and shares the same six month experience at The Basic School where he is taught, among other things, that his primary focus is to support "the grunt in the field." There is no separate judge advocate "Corps" in the Marine Corps,<sup>328</sup> and every Marine officer, in theory, is an unrestricted officer. Every Marine has it ingrained in his head from the moment he joins the Marine Corps, that when everything else is stripped away, he is first and foremost, "a rifleman."<sup>329</sup> The Marine commander grew up in the same system alongside his judge advocate counterpart. The need for "good order and discipline" in a unit is not a "secret" that the Marine Corps only reveals to future commanders. For a commander to argue that he has a "monopoly" on that understanding is shortsighted. Such a view discounts the experience of those who have been "privileged to have been led" by great commanders.

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<sup>327</sup> See *supra* note 149. (question 17).

<sup>328</sup> The separate Judge Advocate Corps in each of the other services, and their separate promotion processes may provide them with an additional measure of protection against unlawful command influence.

<sup>329</sup> U.S. MARINE CORPS, FMFM 1-0, LEADING MARINES p. 14 (citing to General Carl E. Mundy, Jr., *Every Marine a Rifleman*, MARINE CORPS GAZETTE (Jan. 1993) at 12-13).

By the time any service judge advocate reaches the rank of O5/O6, he himself has been a member of a number of military units and has experienced for himself the effects of both good and poorly disciplined units. He has served under both good and bad commanders. If he has not himself commanded a unit<sup>330</sup> there is a good chance that he has served as an officer-in-charge of a legal team or law center. The experience in that position of leadership is analogous to that of a commander only on a much smaller scale.

Placing the power to refer charges to trial in the hands of a “same service” judge advocate will not thwart the disciplinary goals of the commander. The service judge advocate shares the same values as his commander and knows the unique disciplinary customs and traditions of his service. Understanding that the commander is the one ultimately held responsible “for everything his unit does or fails to do,” the military district attorney will afford the commander’s opinion great weight. Commanders survive the disagreements they sometimes have with the findings and sentences of military judges. They will likewise survive the occasional disagreement they will have with the military district attorney. Some have argued that civilians instead of the military should administer the military justice system.<sup>331</sup> The proposed model combines the best of both.

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<sup>330</sup> In addition to direct accessioning from law schools, each of the services has programs which fund the legal education costs of “line” officers in return for their service as future judge advocates. Some of these individuals may have command experience at the small unit level such as the platoon or company. Marine judge advocates are routinely screened for command billets.

<sup>331</sup> See e.g., Allan Thompson, *Blueprint for Military’s Future ‘Today We Begin the Process of Restoring the Pride,’ Defense Minister Says*, THE TORONTO STAR, Mar. 26, 1997, at A21.

Dickson’s report [The Special Advisory Group on Military Justice and Military Police Investigation Services] cited one witness who said: “If you are going to trust the chain of command to lead the Canadian Forces into battle, surely you must also trust it to administer military justice appropriately.” Following from that lead, the Dickson panel recommended changes to reform the justice system from within—**contrary to some recommendations that**

### 3. *The Maturation of Our Military Justice System*

A second argument has been made that the problems of military justice are peculiar to the armed services and that civilian methods and standards of administering justice are not appropriate. The fact is that with the exception of such offenses as absence without leave, desertion, and insubordination, the great majority of cases brought before courts martial are for precisely the same offenses as civilian courts include within their jurisdiction—such offenses as drunkenness, disorderly conduct, larceny, fraud, rape, murder, and the like. And as to the so-called military offenses, what is there about them which makes inapplicable the principle that every accused person is entitled to a fair trial? Bear in mind, that I would reserve to command the right to order to trial any person whom his commanding officer believes guilty of an offense. All that I ask—all that the bar and veterans' groups request—is that when the man is placed on trial, he shall be tried by a free and impartial court, not under the influence or coercion of the commanding officer, either directly or indirectly. If this is not the right of every American citizen, it is time that the Senate make it the right of every American citizen.<sup>332</sup>

The military justice system has matured a great deal from the days when courts-martial were regarded as “singularly inept in dealing with the nice subtleties of constitutional law.”<sup>333</sup> Amendments to the UCMJ have increasingly allocated legal decisions to lawyers and have made the military justice system more analogous to its civilian counterpart where Congress viewed that such changes would not have an adverse effect on the military environment.<sup>334</sup> Examples of significant changes that have been adopted from the civilian

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**military justice be moved out of defence to the solicitor-general's department.** (emphasis added).

<sup>332</sup> 96 CONG. REC. 1430 (1950) (statement of Sen. Morse), *reprinted in* II Index and Legislative History to the Uniform Code of Military Justice, 1950 at 1815 (1985).

<sup>333</sup> *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969) (noting the lack of a presiding judge, different rules of evidence and procedure, and the possibility of command influence by the convening authority, Justice Douglas remarked that “[a] court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.” *id.*

<sup>334</sup> *See generally* To Amend Chapter 47 of Title 10, United States Code (The Uniform code of Military Justice), To Improve the Quality and Efficiency of the Military Justice System, To Revise the laws concerning review of

criminal justice system include the assignment of defense counsel, military trial judges, and civilian appellate review of trial by courts-martial.<sup>335</sup> The last significant overhaul of the UCMJ was in 1983.<sup>336</sup> Divesting the commander of prosecutorial discretion and placing it in the hands of a military district attorney is the next logical step in this trend.

#### 4. *Increased Speed*

“Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order.”<sup>337</sup>

The maturation of the military justice system in the form of greater rights and protections afforded to an accused has lengthened the court-martial process considerably from time of offense until time of trial. For example, the accused is entitled to extensive discovery of the government’s case against him, continuances in the case in order to be prepared for trial, and

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Courts-Martial, and for other purposes: Hearing on S. 974 Before the Subcomm. on Military Personnel and Compensation of the House Comm. on Armed Services, 98<sup>th</sup> Cong. (1983) (statement of Hon. William H. Taft, IV, General Counsel, Department of Defense)

Over the years, I think that the tendency in the amendments that the Congress has been considering to the Uniform Code of Military Justice has been to allocate the increasingly complex responsibilities for legal determinations and legal reviews to the lawyers in the system, while relieving the commanders of the burden of those technical reviews, and preserving the commander’s essential responsibilities of command, and assuring that he carries those out without being burdened with the legal work.

The other trend has been to conform where possible the protections and scheme of the military justice system to the criminal justice system in the civilian world where that is permitted without adversely affecting the peculiar special nature that the military environment requires. *Id.*

<sup>335</sup> See generally Major Guy P. Glazier, *He Called for his Pipe, and He Called for his Bowl, and He Called for is Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 108 n. 433 (1998).

<sup>336</sup> See Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

<sup>337</sup> *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955).

individual military counsel. He may retain civilian counsel at his own expense, request the production of witnesses worldwide at government expense, request expert assistance and testimony, and litigate the denial of any of these rights through an extensive motions practice. All of these factors can lengthen the period between commission of the alleged offense and trial.

Moreover, the ministerial and substantive acts required of a commander in the court-martial process only add to the delay. Military justice is but one small piece of the overall pie that demands a commander's attention. The commander must be available to appoint the article 32 investigation; act on requests for individual military counsel; convene the court; appoint its members; refer the charges; act on witness and sanity board requests; and personally approve any negotiated pretrial agreement. The commander accomplishes most of these tasks only after consulting his prosecutor either in person or by telephone. The paperwork necessary to accomplish these tasks flows from the judge advocate to the commander and then back again. All of this takes time, and all of this contributes to extra delay between offense and trial. Eliminating the commander's ministerial and substantive role can only serve to speed the process along.

##### *5. Military Justice as a Special Skill*

It is inherent in the military criminal justice system that officers serving as **convening authorities who have little or no legal training are empowered to make legalistic decisions impacting on the rights of servicemembers accused of offenses under the Code.** The practice of obtaining legal guidance from judge advocates or legal officers is not only permitted by the Code and the Manual, but, by law, necessity and custom, strongly encouraged. The Manual's discussion of R.C.M. 405 provides, "The primary purpose of the investigation required by Article 32 and this rule is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information of which to determine what disposition should be made of the

case.” **These objectives demand that convening authorities rely heavily on legal advisors for their attainment.**<sup>338</sup> (citations omitted) (emphasis added).

If this is true, the failure by Marine commanders to consult with legal counsel before making “legalistic decisions impacting on the rights of service members” strengthens the need for a military district attorney. While the majority of commanders surveyed believe that military justice is **not** a specialized field of knowledge unique to judge advocates,<sup>339</sup> there is a distinct split in the responses between the two services about the practice of consulting with judge advocates before invoking the military justice system. The majority of Marine commanders surveyed consulted their judge advocates less than 50% of the time before deciding to conduct nonjudicial punishment, to refer charges to trial, or to recommend referral of charges to trial.<sup>340</sup> The majority of Marine commanders also believe that at some point in their careers they become knowledgeable enough about “military justice” matters to make decisions on their own about the appropriate disposition of a case.<sup>341</sup>

Allowing the commander to select the accused, the charges, and the court-martial forum for the judge advocate is analogous to allowing the judge advocate to select the enemy, the tactics, and the battlefield for the infantry commander. Neither one is trained to successfully do the job of the other. Trial by court-martial is the judge advocate’s version of “combat” and it makes no sense for someone who has never “fought” in that arena to pick the targets, the tactics, and the battlefields.

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<sup>338</sup> United States v. Bramel, 29 M.J. 958, 966-967 (A.C.M.R. 1990).

<sup>339</sup> See *supra* note 149. (question 9).

<sup>340</sup> *Id.* (questions 13-14).

There is not a problem with the commander making an incorrect decision when he refers a serious felony case to trial by general court-martial. No commander needs a judge advocate to tell him to try an attempted murder charge at a general court-martial. The problem rests with two categories of cases. The first involves cases that *should* be referred for trial but are not.<sup>342</sup> The second involves cases that *should not* be referred to trial but are for reasons that should not play a role in the proper exercise of prosecutorial discretion.<sup>343</sup>

The important function of evaluating complaints before initiating criminal proceedings should not be left to ad hoc judgments. Vesting the primary responsibility for the decision to prosecute in the prosecutor's office requires that orderly procedures be established for the screening of cases initiated by the police. It is highly desirable, as is done in some of the larger prosecution offices, that a complaint unit and an indictment unit serve these functions. Over the years, they gather experience and judgment in the exercise of their screening function. This specialization is particularly effective where the prosecution office places these screening functions in the hands of staff lawyers whose familiarity with trial and appellate problems gives them a broad base for evaluating cases.<sup>344</sup>

Criminal law is complex and commanders are not formally trained in the law. The commander's formal training in military justice comes from mini-courses designed to help

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<sup>341</sup> *Id.* (question 10).

<sup>342</sup> See MOYER, *supra* note 128.

<sup>343</sup> In 1997, a Camp Pendleton Marine was tried at special court-martial for a violation of article 92, "failure to obey an other lawful order." The sole specification alleged that the accused violated the order by failing to complete the Marine Corps Institute correspondence courses he had signed out in accordance with a schedule that had been set out for him by his company first sergeant. The accused plead not guilty to the charge and the case was tried before military judge alone. The military judge acquitted the accused of the charge. After the trial, the trial counsel informed the military judge that the case was an "NJP refusal." Telephone interview with Major John R. Ewers, Military Judge, Sierra Judicial Circuit, Navy-Marine Corps Trial Judiciary, Camp Pendleton, Cal. (Apr. 29, 1999).

<sup>344</sup> AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.4 commentary (3d ed. 1993).

him avoid common pitfalls.<sup>345</sup> Based on the standard length of command tours, even those with prior command experience will have limited experience with the military justice system. Three years of law school does not adequately prepare the judge advocate either. Quality time in the courtroom trenches as a prosecutor, defense counsel, or trial observer is what gives the judge advocate the edge in the ability to assess a case properly. Mentoring by a more experienced trial attorney is another method. The judge advocate may be no better than the commander in predicting how a jury will decide a case, but in our system, like most civilian criminal justice systems, the vast majority of cases are negotiated guilty pleas. In these cases, the prosecutor knows the judge, the opposing counsel, and what the case is "worth." He is the most qualified person to decide where and how it should be adjudicated.<sup>346</sup>

The charging decision is critical in criminal trials and the lawyer is uniquely qualified for this task. There must be "admissible" evidence to support a charge and this requires an

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<sup>345</sup> The Naval Justice School, located in Newport, Rhode Island offers a number of "in house" and "satellite" courses targeted at commanders and executive officers in military justice related matters. The "senior officer course," taught in Newport, Rhode Island, Norfolk, Virginia and San Diego, California is an approximately four and one-half day course split equally between military justice and administrative law. Instructors at the Naval Justice school teach the equivalent of two days of instruction on military justice related matters to commanders and executive officers at the Surface Warfare Officers' School, also located at Newport, Rhode Island. Two days of instruction split between military justice and administrative law is also provided as part of a four week "Major Shore Commands" course for those commanders slated to command a major naval installation. Telephone interview with Lieutenant Commander James R. Crisfeld, Evidence Instructor, Naval Justice School, Newport, Rhode Island (Mar. 30, 1999); The Judge Advocate General's School, located in Charlottesville, Virginia offers similar "in house" courses targeted at its future commanders. The "Senior Officer Legal Orientation" (SOLO) course is a week long resident course that contains at least two full days devoted to military justice. Also included is core instruction in administrative law, contract & fiscal law, and international law. The school also offers a individualized, resident "General Officer Legal Orientation" (GOLO) course. This course is tailor made to meet the needs of the officer attending the course. Interview with Lieutenant Colonel Kevin Lovejoy, Department Chair, Criminal Law Division, The Judge Advocate General's School, U.S. Army, Charlottesville, Va. (31 Mar. 1999).

<sup>346</sup> See *supra* note 149. (question 8).

understanding of the rules of evidence. The law of “multiplicity” is complex<sup>347</sup> yet the powers of referral and withdrawal both reside with the convening authority.<sup>348</sup> The discretion to refer multiple charges to trial increases the risk that the accused will be convicted of one. The fact that several charges have been referred to a court-martial for trial (and in the case of a general court-martial, been to an article 32 investigation), may suggest to the members that the accused must be guilty of something. “Moreover, where the prosecution’s evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict.”<sup>349</sup> The charging process is equally subject to abuse by the military district attorney as it is by the commander. Yet, the district attorney is more attuned to the problem than the commander. The district attorney knows better the case law and the dictates of the Manual for Courts-Martial’s provisions on the unreasonable multiplication of charges.<sup>350</sup> The district attorney is also subject to a professional code of ethics to which the commander is not.<sup>351</sup> He risks the wrath of the military judge and jury for a decision that is ultimately not his to make. It is time Congress took another look at amending the UCMJ “to provide formal recognition of current practice.”<sup>352</sup>

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<sup>347</sup> See generally *United States v. Oatney*, 45 M.J. 185 (1996); *United States v. Weymouth*, 43 M.J. 329 (1995); *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993).

<sup>348</sup> See MCM *supra* note 4, R.C.M. 601, 604.

<sup>349</sup> *Missouri v. Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting).

<sup>350</sup> See MCM *supra* note 4, R.C.M. 307(c)(4), Discussion (“What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.”)

<sup>351</sup> See discussion *infra* Part VI.B.7.

<sup>352</sup> Cf. *supra* note 123.

## 6. *Freeing up the Commander to Fight*

Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.<sup>353</sup>

Amen to that! The burdens placed on today's commanders are tremendous.<sup>354</sup> The military district attorney relieves the commander of the complex burdens and associated pressures of administering the courts-martial system.

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<sup>353</sup> United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

<sup>354</sup> See, e.g. U.S. DEP'T OF ARMY, REG 600-20, EQUAL OPPORTUNITY PROGRAM IN THE ARMY, para. 6-2(g), (h) (30 Mar. 1988) (IO4, 17 Sept. 1993) [hereinafter AR 600-20].

- g. Commanders at all levels. Unit commanders are the EO officers for their commands and are assisted by EO advisors and other members of the staff, who provide advice on matters in their areas of responsibility. **All commanders will--**
  - (1) Develop and implement EO programs for their organizations.
  - (2) Identify discriminatory practices affecting soldiers, civilian employee, and their families, initiate corrective actions, and provide followup and feedback throughout problem resolution.
  - (3) Promote EO and interpersonal harmony for all soldiers, civilian employee, and their families.
  - (4) Conduct EO training on a continuing basis for subordinate commanders and other civilian and military personnel that is consistent with this regulation, major Army command (MACOM) directives, and local guidance.
  - (5) Monitor and assess the execution of EO programs and policies at all levels within their areas of responsibility.
  - (6) Ensure involvement of public affairs personnel at every level of command in planning, executing, and monitoring equal opportunity programs.
  - (7) Publish and post written command policy statements for equal opportunity, the prevention of sexual harassment, and equal opportunity complaint procedures. All statements will be consistent with Army policy and are required for each MACOM, installation, separate unit, agency, and activity down to company/troop/battery or equivalent level.

## 7. *Eliminating The Ethical Conflict*

Former Chief Justice Warren Burger remarked that “if there ever was a litmus test or standard with which to evaluate any criminal justice system, the ABA Standards [for the Administration of Criminal Justice] is it.”<sup>355</sup> The ABA Standards for the Administration of Criminal Justice are the culmination of significant work by experts in the field.<sup>356</sup> Simply put, vesting the commander with prosecution authority and the decision to charge is inconsistent with those standards.<sup>357</sup>

The role of the commander and prosecutor conflict. “The duty of the prosecutor is to seek justice, not merely to convict.”<sup>358</sup> The commander also seeks “justice” but to him, the military justice system is primarily a tool of discipline.<sup>359</sup> In the world of the commander,

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(8) Ensure smaller-unit-level equal opportunity representatives are appointed and trained.

(h) It is strongly recommended that commanders conduct a unit climate assessment and unit training needs assessment within 90 days of assuming command (180 days for Reserve Components) and annually thereafter. This ....

<sup>355</sup> See MAJOR WILLIAM C. THOMPSON, JR. & MAJOR JOHN H. L. WILKERSON, NATIONAL CONF. OF SPECIAL COURT JUDGES AMERICAN BAR ASSOCIATION, COMPARATIVE ANALYSIS OF THE AMERICAN BAR ASSOCIATION STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE AND MILITARY PRACTICE AND PROCEDURE vii (1978).

<sup>356</sup> *Id.* at v (“Nine years of work by committees composed of judges, prosecutors, defense lawyers, private practitioners, law enforcement professionals and educators were culminated with final ABA approval of seventeen volumes of standards for criminal justice.”).

<sup>357</sup> *Id.* at 26 (Standard 2.1), 36 (Standard 3.4). These two standards remain unchanged today with the exception that standard 3.4 adds an additional paragraph dealing with prosecutorial oversight of investigators. see AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 3-2.1, 3-3.4 *supra* note 83.

<sup>358</sup> *Id.* at § 3-1.2(c).

<sup>359</sup> See Survey Results *supra* note 148.

“justice” is achieved and equated more often with conviction and a stiff sentence than it is with acquittal.<sup>360</sup>

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<sup>360</sup> Compare Committee on the Uniform Code of Military Justice, *Good Order and Discipline in the Army: Report of Honorable Wilber M. Bruckner, Secretary to the Army*, 17-21 (18 Jan. 1960) (emphasis added). excerpts from a letter which the Powell Committee recommended The Judge Advocate General of the Army send to officers newly appointed as general court-martial convening authorities.

Dear:

Because it is of the utmost importance that commanders maintain the confidence of the military and the public alike in the Army military justice system, the following suggestions are offered you as a commander who has recently become a general court-martial convening authority, in the hope that they will aid you in the successful accomplishment of your military functions and your over-all command mission.

\* \* \*

A serious danger in the administration of military justice is illegal command influence. Congress, in enacting the Uniform Code of Military Justice, sought to comply with what it regarded as a public mandate, growing out of World War II, to prevent undue command influence, and that idea pervades the entire legislation. It is an easy matter for a convening authority to exceed the bounds of his legitimate command functions and to fall into the practice of exercising undue command influence. In the event that you should consider it necessary to issue a directive designed to control the disposition of cases at lower echelons, it should be directed to officers of the command generally and should provide for exceptions and individual consideration of every case on the basis of its own circumstances or merits. For example, directives which could be interpreted as requiring that all cases of a certain type, such as larceny or prolonged absence without leave, or all cases involving a certain category of offenders, such as repeated offenders or offenses involving officers, be recommended or referred for trial by general court-martial, must be avoided. This type of directive has been condemned as illegal by the United States Court of Military Appeals because it is calculated to interfere with the exercise of the independent personal discretion of commanders subordinate to you in recommending such disposition of each individual case as they conclude is appropriate, based upon all the circumstances of the particular case. The accused's right to the exercise of that unbiased discretion is a valuable pretrial right which must be protected. *All pretrial directives, orientations, and instructions should be in writing and, if not initiated or conducted by the staff judge advocate, should be approved and monitored by him.*

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The results of court-martial trials may not always be pleasing, particularly when it may appear that an acquittal is unjustified or a sentence inadequate. Results like these, however, are to be expected on occasion. Courts-martial, like other human institutions, are not infallible and they make mistakes. In any event, the Uniform Code prohibits censuring or admonishing court members, counsel, or the law officer with respect to the exercise of their judicial functions. My suggestion is that, like the balls and strikes of an umpire, a court's findings or sentence which may not be to your liking be taken as 'one of those things.' Courts have the legal right and duty to make their findings and sentences unfettered by prior improper instruction or later coercion or censure.

Ethical rules govern the conduct of lawyers<sup>361</sup> and recognize the special role and responsibility of the prosecutor in the exercise of “prosecutorial discretion.”<sup>362</sup>

The charging decision is the heart of the prosecution function. The broad discretion given to a prosecutor in deciding whether to bring charges and in choosing the particular charges to be brought requires that the greatest effort be made to see that this power is used fairly and uniformly.<sup>363</sup>

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Committee on the Uniform Code of Military Justice, *Good Order and Discipline in the Army: Report of Honorable Wilber M. Bruckner, Secretary to the Army*, 17-21 (18 Jan. 1960) (emphasis added).

with *United States v. Gleason*, 43 M.J. 69, 72-73 (1995)

The Court of Military Review found that there was no single act on which to hang the label of unlawful command influence. Rather, it was a command climate or atmosphere created by the action of LTC Suchke. His actions of relieving the command structure of Company B without explanation; the characterization of the defense counsel as the enemy; returning the appellant to Okinawa in chains and under guard and placing him in the brig and requiring unit members to receive command permission to visit him; the inspections and unit lock downs without explanation; adverse officer efficiency reports and reliefs of individual [sic] without explanation shortly after testifying for the appellant created, as Judge Cole found [at the Dubai hearing], a pervasive atmosphere in the battalion that bordered on paranoia. We find that the command climate, atmosphere, attitude, and actions had such a chilling effect on members of the command that there was a feeling that if you testified for the appellant your career was in jeopardy.

<sup>361</sup> See AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT 3.8 (1995); see also AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, DR 7-103(A) (1992); see generally MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990) (1994) (“The *Model Code* was quickly adopted, with some variations of substance, by virtually all jurisdictions, and remains in force in about one-third the states.”) *id.* at 4.; (“The ABA has mounted a well-financed effort to promote the adoption of the *Model Rules*, and after seven years they have been adopted in more than half the states. Those states that have rejected the *Model Rules* include California, Massachusetts, and New York.”) *id.* at 5.

<sup>362</sup> See generally AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 3-3.4 (Decision to Charge) 3-3.9 (Discretion in the Charging Decision) (3d ed. 1993).

<sup>363</sup> AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9 comment (3d ed. 1993).

Judge advocates of all services are subject to service rules of professional conduct in addition to those of their state licensing body.<sup>364</sup> The services have largely adopted the American Bar Association (ABA) Model Rules of Professional Conduct with some changes to account for unique aspects of military practice.<sup>365</sup>

To prevent abuses, prosecutors are subject to specific ethical rules that govern the exercise of prosecutorial discretion.<sup>366</sup> Officially, disciplinary action can result if the prosecutor violates these rules.<sup>367</sup> The prospect of professional discipline or criminal prosecution solely for an abuse of prosecutorial discretion is about as likely as prosecution of a commander for unlawful command influence under article 98. Notwithstanding that fact, the prosecutor who works in the military justice system everyday is more sensitized to the dangers and abuses that can result from an abuse of this power. The prosecutor better understands that a court-martial is not a process for clearing one's name as it only returns two verdicts: "guilty" or "not guilty" (as opposed to "guilty" or "innocent").<sup>368</sup> A prosecutor also knows that it is improper to refer a case to trial by court-martial if the commander is unsure of the accused's culpability and simply wants the court to "sort things out."<sup>369</sup>

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<sup>364</sup> See generally, U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 8.5 (1 May 1992) [hereinafter AR27-26]; U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INST. 5803.1A, NAVY RULES OF PROFESSIONAL CONDUCT, Rule 8.5 (13 Jul. 1992) [hereinafter Navy Rules].

<sup>365</sup> See *id.*

<sup>366</sup> See discussion *infra* Part VI.B.

<sup>367</sup> See AR27-26 *supra* note 364; see Navy Rules *supra* note 364.

<sup>368</sup> Former labor secretary Raymond Donovan's quote upon being acquitted of charges brought by the Justice Department is now famous: "Where do I go to get my reputation back?" see George Hansen, *The Two Faces of Justice*, WASH. POST, Aug. 13, 1988, at A21.

<sup>369</sup> See AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT, Rule 3.8 (1995) ("The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that

It is the experience of the criminal law bar that these special rules are necessary to govern the tremendous power wielded by a prosecutor in the name of the government.<sup>370</sup> It makes no sense to hand over this power to an individual who is not only not subject to the rules, but may not even know of their existence. That is exactly what our military justice system does. We vest Commanders with the power of "prosecutorial discretion" yet they are not formally subject to these ethical rules.<sup>371</sup> This can result in a conflict between the prosecutor who believes that a charge or specification is not warranted by the evidence and the commander who wants the charge or specification referred to trial.<sup>372</sup> This can also lead to conflicts where the prosecutor believes that non-criminal disposition of an offense is the appropriate

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the prosecutor knows is not supported by probable cause;"); *accord* AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, DR 7-103(A) (1992) ("A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause."); *see also* AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9 (3d ed. 1993) ("(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."

<sup>370</sup> *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT, Rule 3.8, comment (1995) ("[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense.").

<sup>371</sup> *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 3.8(a) (1 May 1992) [hereinafter AR27-26] ("A trial counsel shall: (a) recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn;"); *compare supra* note 369.

<sup>372</sup> *See* AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9 (3d ed. 1993) ("(c) A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.").

disposition.<sup>373</sup> The classic illustration is the “nonjudicial punishment refusal.” Should every nonjudicial punishment refusal result in a trial by court-martial? A more frequent conflict develops during the sentencing portion of a trial. The commander may desire the prosecutor to argue for a specific sentence that the evidence at trial and “justice” do not warrant.

The military prosecutor faces a difficult dilemma in our system of justice as it presently exists. The prosecutor is subject to ethical rules governing “prosecutorial discretion” but it is the commander who exercises it. The best case scenario for the prosecutor is to convince the commander to comply with these rules. When that fails, the prosecutor ideally should decline to prosecute the case to resolve the conflict. By such action, the prosecutor informally subjects the commander to the same ethical rules. This is easier said than done. The majority of our prosecutors and chiefs of military justice are captains and majors. The majority of our court-martial convening authorities are of at least the rank of lieutenant colonel.<sup>374</sup> The inclination of the staff judge advocate is to support the commander and find a way to do legally what he wants done. The trial team exists to support the commander. Even if the prosecutor gains the support of his staff judge advocate, nothing prevents the commander from firing the prosecutor or finding another who will carry out his wishes. The

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<sup>373</sup> See AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9 (3d ed. 1993) (“(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are: (i) the prosecutor’s reasonable doubt that the accused is in fact guilty; (ii) the extent of the harm caused by the offense; (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender; (iv) possible improper motives of a complainant; (v) reluctance of the victim to testify; (vi) cooperation of the accused in the apprehension or conviction of others; and (vii) availability and likelihood of prosecution by another jurisdiction.”).

<sup>374</sup> See *supra* note 4.

current system provides no systemic check against a commander exerting pressure on others to “see things his way.” A military district attorney would provide such a check.

#### 8. *Eliminating Command Influence on Discretionary Decisions*

“Command influence is inevitable in a military justice system where the commanding officer also makes the key decisions in disciplinary matters.”<sup>375</sup> Both actual and apparent command influence are problematic, since both justice and the perception of justice are vital—justice for those serving in the military, and a perception of justice for those serving in the military and for the public.”<sup>376</sup> Removing the commander’s power to refer charges to trial by court-martial will prove a significant step toward eliminating both actual and apparent unlawful command influence during the accusatorial and adjudicative stages of a court-martial.

In the accusatorial stage, the universe of a subordinate commander’s disciplinary decisions subject to unlawful command influence will be greatly reduced. The subordinate commander’s discretionary decisions will be limited to disposing of minor offenses through nonjudicial punishment and administrative action.

The transfer of power from commander to district attorney should have an important symbolic effect for the perceived fairness of the system. The loss of this “power” by the commander should work to strengthen respect for the chain-of-command. The commander will not be viewed as “above the law.” The distinction between a “personal” versus

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<sup>375</sup> *Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol5/v5c40ae.htm>>

<sup>376</sup> *Id.*

“official” interest in the prosecution of an accused will be bright. It will be more difficult to ascribe improper motives to a commander and the chain-of-command when it is the district attorney who decides when to prosecute. The district attorney will represent a true “official” interest.

The transfer of the power to refer charges will also move the “target” for future intentional acts of unlawful command influence from the subordinate commander to the military district attorney. The subordinate commander’s only weapon to combat improper influence was his own moral courage. Located completely outside the chain of command, the district attorney’s career will be immune from the commander’s power to write performance evaluations, make billet assignments, or manipulate the host of other aspects of military life where a superior can exert influence over his subordinate.<sup>377</sup> The military district attorney will have the true independence to make charging decisions based on appropriate factors.

As the keys to the courtroom are passed from the commander to the district attorney, so to will pass the commander’s virtual immunity from prosecution. The answer to the question of “what is the worst that could happen?” will no longer be “to have the Court of Military

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<sup>377</sup> See generally Memorandum from the Under Secretary of Defense for Personnel and Readiness to the Secretary of Defense, Subj: Ensuring the Good Order & Discipline Required For Effective Military Forces (Jul. 29, 1998) <[http://www.defenselink.mil/pubs/go\\_d\\_usdpr07291998.html](http://www.defenselink.mil/pubs/go_d_usdpr07291998.html)> (“Military commanders and supervisors exercise substantial control over many aspects of their subordinates’ lives. This authority ranges from directing daily tasks to making decisions that affect their careers and personal life, to issuing orders that place subordinates at risk of injury or even death. The mere perception that members in positions of authority may have abused that authority or made decisions based upon favoritism, adversely affects morale, and can degrade readiness.”).

Appeals reverse the decision and give him “hell.””<sup>378</sup> The worst that could happen will be criminal prosecution.

Transferring the referral power will also likely reduce the consequences that flow from unintentional acts of unlawful command influence. The commander’s removal from the central role he now plays in the system makes it more likely that any extrajudicial statements he does make will be less likely to affect the disposition of a case. The lines of command through which control was previously exercised will be severed. The force of his opinion will no longer be determinative of the disposition of a case. The commander will become a “consumer” of the military justice system. As such, he may finally be free to say to his unit as a commander what he was prohibited from saying because of his role as a convening authority.<sup>379</sup> Moreover, a commander removed from the day-to-day workings of the system will be less likely to try to exert his influence over it. It is difficult to exert influence over something one does not control.

#### 9. *Better Use of Limited Resources*

The breadth of criminal legislation necessarily means that much conduct that falls within its literal terms should not always lead to criminal prosecution. It is axiomatic that all crimes cannot be prosecuted even if this were desirable. Realistically, there are not enough enforcement agencies to investigate and prosecute every criminal act that occurs. Moreover, some violations occur in circumstances in which there is no significant impact on the community or on any of its members. A prosecutor should adopt a “first things first” policy,

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<sup>378</sup> See discussion *infra* Part IV.D.2.

<sup>379</sup> See *United States v. Newbold*, 45 M.J. 109 (1996) (holding the accused failed to meet his burden to establish apparent unlawful command influence) The commander of the ship held an “all hands” meeting the day following the accused’s arrest where he called the participants in the rape of a prostitute “low lifes” and “scumbags.” The court drew a distinction in this case because the commander of the ship was not the convening authority. *Id.* at 111.

giving greatest attention to those areas of criminal activity that pose the most serious threat to the security and order of the community.”<sup>380</sup>

Courts-martial cost money and fiscal restraints are not likely to disappear. The power of the purse involves the power to control. To ensure the independence of his decisions, the district attorney must control and manage a separate military justice budget to fund the costs associated with trial by courts-martial. To argue that a commander should be able to spend his money on the cases he wants tried, is to ignore that prosecutorial personnel resources are also a finite resource. With multiple convening authorities, a limited number of prosecutors, and fiscal constraints, the military district attorney is best positioned to “triage” what cases must go to trial and what cases must wait.

#### *10. Greater Uniformity*

In all states, there should be coordination of the prosecution policies of local prosecution offices to improve the administration of justice and assure the maximum practicable uniformity in the enforcement of the criminal law throughout the state.<sup>381</sup>

At any given military installation, there is a potentially large population of commanders who currently play the role of “district attorney” and exercise prosecutorial discretion for their individual commands. While especially true at the summary and special court-martial level, it also holds true at the general court-martial level.<sup>382</sup> The only tool presently available

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<sup>380</sup> AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9 comment (3d ed. 1993).

<sup>381</sup> AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-2.2(c) (3d ed. 1993).

<sup>382</sup> Aboard Marine Corps Base, Camp Pendleton, California, no less than five general court-martial convening authorities exercise prosecutorial discretion over Marines stationed there. They include the commanding generals of the Marine Corps Base, III Marine Expeditionary Force, 1<sup>st</sup> Marine Division, 3d Marine Aircraft Wing, and 3d Force Service Support Group. Fifty separate special court-martial convening authorities also

to guide the commander's exercise of discretion is R.C.M. 306(b).<sup>383</sup> Any uniformity that is established in charging decisions within a unit changes approximately every eighteen months when there is a change of command and a new "district attorney" assumes command. If he has never commanded before, one can expect some "growing pains" before the commander

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exercise prosecutorial discretion over Marines stationed there. Telephone interview with Major John Havranek, Military Judge, Sierra Judicial Circuit, Navy-Marine Corps Trial Judiciary, Camp Pendleton, Cal. (Mar. 29, 1999).

<sup>383</sup> See MCM *supra* note 4, R.C.M. 306(b) discussion

The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.

In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:

- (A) the character and military service of the accused;
- (B) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
- (C) appropriateness of the authorized punishment to the particular accused or offense;
- (D) possible improper motives of the accuser;
- (E) reluctance of the victim or others to testify;
- (F) cooperation of the accused in the apprehension or conviction of others;
- (G) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
- (H) availability and admissibility of evidence;
- (I) existence of jurisdiction over the accused and the offense; and
- (J) likely issues.

These guidelines are based on the *ABA Standards, Prosecution Function* § 3-3.9(b) (1979). See MCM *supra* note 4, R.C.M. 306(b) analysis, app. 21, at A21-21.

establishes his own policy on how to dispose offenses. By the time he has established a relationship of trust with the prosecutor assigned to his unit and learned more about military justice through his dealings with that prosecutor, he is ready to hand over his command to someone new. The process then repeats itself.

Greater uniformity provides for a more even handed system of justice in that similarly situated defendants will have their cases disposed of in like ways.<sup>384</sup> Under the present system, two similarly situated soldiers involved in similar deeds of misconduct may or may not be with the same offense based on the coincidence of whether they serve with a ground, air, or support unit. They might also face different forums on the mere coincidence that they were assigned to different battalions, brigades or groups comprising the same parent unit. If the present system provides for any uniformity at all, it does so only for the duration of that commander's tour with that one particular unit.<sup>385</sup>

There is a benefit in having one person make the call. The most logical choice is the military district attorney. In contrast to the commander, the military district attorney has spent his career developing the skills to discriminate between cases for the right reasons. He

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<sup>384</sup> The benefits of such guidelines include:

“providing guidance to inexperienced prosecutors; helping to insure equal treatment of similarly situated defendants; helping to eliminate consideration of any inappropriate basis for the exercise of prosecutorial discretion, such as race, religion, sex, sexual preference, or ethnicity of either the defendant or the victim; and helping to protect prosecutors from undue judicial pressure on decisions that are discretionary rather than mandatory.”

AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-2.5 comment (3d ed. 1993).

<sup>385</sup> The Service Criminal Courts of Appeals have broad review powers to establish uniformity of sentences in closely related cases where there are disparate sentences. In this case, the court substantially reduced the sentence of the accused because the “closely related case” involved preferential treatment of an accused who happened to be the son of the then Secretary of the Navy. Contained within the opinion of this case is a lengthy

alone is not the “sine qua non” for greater uniformity. With the transfer of power from the commander to the district attorney must come published “prosecutorial guidelines.”<sup>386</sup> Even if a commander could apply “prosecutorial guidelines” just as well as a military district attorney, the sheer proliferation of commanders at any one installation militates against such a proposal. The proposed adultery “prosecutorial guidelines” illustrate the point that arming multiple commanders with a set of guidelines is only a “half-step” toward greater uniformity.<sup>387</sup>

The proposed system would provide notice that is more predictable to the military population about where misconduct will likely be adjudicated. The 3-4 year standard tour length for a military district attorney would provide such notice for a longer period than presently exists. Presently, notice is provided, if at all, during the length of the commander’s

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discussion of “reverse unlawful command influence” exercise on seaman Garrett’s behalf. *see* United States v. Kelly, 40 M.J. 558 (N.M.C.M.R. 1994).

<sup>386</sup> *See* AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-2.5(a) (3d ed. 1993)

Each prosecutor’s office should develop a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office. The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law.

<sup>387</sup> With respect to the recently proposed adultery guidelines and the listed factors that commanders should consider to determine whether acts are prejudicial to good order and discipline or are of a nature to bring discredit upon the armed forces *compare* Department of Defense News Briefing, Office of the Assistant Secretary of Defense (Public Affairs) (Jul. 29, 1998) (statement of Ms. Judith Miller, General Counsel, Department of Defense) (“The point I’m making is that while it **may not guarantee absolute uniformity**, by giving a set of factors that everyone can look to, it will help commanders on a practical, day-to-day basis try to come out with the right result.”) (emphasis added) *with* 144 CONG. REC. S9541 (statement of Sen. Byrd)

Mr. President, how remote is remote? What kind of clarity does that guidance impart? Is last month remote enough in time to avoid a criminal prosecution for adultery? How about last week—is that enough? Last month? Last year? Would this “clarification” have salvaged Air Force General Joseph Ralton’s nomination to be Chairman of the Joint Chiefs of Staff? Would this guideline let Army Major General David Hale off the hook for abruptly retiring while he was under investigation for alleged sexual misconduct?

tour. At a minimum, the proposed system would provide greater uniformity at the installation level. Published uniformed service “prosecutorial guidelines” in the hands of military district attorneys may make such notice transparent across the services at all duty stations.<sup>388</sup>

*a. A System Perceived to be Fair*

It is often said that perception is reality. Perhaps this is especially true in the administration of justice because any justice system, whether it be military or civilian, depends for its legitimacy on the respect of the individuals that are subjected to it. When a significant number of individuals who are governed by that system have lost respect for this institution, and feel that there is a double standard, then there is a serious problem that must be addressed or the system will collapse. Thus, while a distinct military justice system is both desirable and necessary, we believe it is essential that all service members be treated equally except where distinctions are clearly justified, such as with respect to the choice of the appropriate sentence where the impact of the punishment may have a disproportionate effect depending on the rank of the accused.<sup>389</sup>

The Canadian military justice system is not alone in being charged with operating under a double standard.<sup>390</sup> The United States military justice system has suffered such attacks

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<sup>388</sup> See AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-2.2 comment (3d ed. 1993) (“An example of effective administration on a nationwide basis is the Department of Justice, which functions through nearly one hundred appointed United States Attorneys in more than fifty states and territories, with central direction in the Attorney General in Washington.”).

<sup>389</sup> *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie2.htm>>.

<sup>390</sup> See generally *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie2.htm>>.

What did surprise us, though, was the pervasive opinion among CF members that there is a double standard in the application of military justice between NCMs [noncommissioned members] on the one hand, and officers on the other. For it is widely perceived among NCMs to whom we spoke, particularly of the junior ranks, that they are not treated the same as are officers.

throughout its history.<sup>391</sup> The charge was only recently renewed.<sup>392</sup> A military district attorney located outside the chain of command will eliminate “charging” double standards—both actual and apparent.

### *C. Dangers of The New Model*

#### *1. A Lack of Trust in the Commander*

If you are going to trust the chain of command to lead the Canadian Forces into battle, surely you must also trust it to administer military justice appropriately.<sup>393</sup>

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*cf. Dishonoured Legacy – The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Department of National Defence, Canada (visited Jan. 9, 1999) <<http://www.dnd.ca/somalia/vol0/v0s24e.htm>>. Speaking about the Government’s decision to truncate the Inquiry, the Commission had this to say:

We continue to believe that important facts concerning the deployment and its aftermath are not yet known or remain obscure. We thought, because of its public statements, that the Government also believed that it was essential, and in the interests of the Canadian military and its renewal, to expose, understand, confront, and analyze the facts publicly and in an independent, nonpartisan setting, as well as address all the important matters raised in the terms of reference. Obviously, we were mistaken, as the Government abandoned its earlier declared interest in holding to account senior leaders and officials who participated in the planning and execution of the mission and responded to the problems that arose. ***Once again, history repeats itself, in that only the lower ranks have been made to account for the marked failure of their leaders.***” (emphasis added) *Id*

<sup>391</sup> See e.g. LUTHER C. WEST, *THEY CALL IT JUSTICE* (1977).

<sup>392</sup> See 144 CONG. REC. 8984 (1998) (statement of Sen. Byrd)

The recent and highly publicized instances of adultery, sexual harassment, and rape within America’s military have wounded the prestige of our armed services and have ruined individual lives, families, and careers. The uneven handling of several high profile cases—ranging from swift and harsh punishment meted out to enlisted personnel and junior officers to an apparent blind eye turned to the misconduct of certain high-ranking officers—has only exacerbated the problem and led to the perception of a double standard in the military.

<sup>393</sup> *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie2.htm>>. (Statement by an unidentified witness testifying before the special advisory group.).

The majority of commanders do, or try to, administer military justice fairly. Unfortunately, the damage caused by those who do not, “undoes” the good.<sup>394</sup> Even those who do administer it properly are subject to second guessing about the pureness of their motives because of the inherent conflict between their roles as commander and convening authority. The perception that justice is being done is as important as the reality that it is in fact being done.<sup>395</sup> As was stated earlier, for many, “perception is reality.”<sup>396</sup>

If there is a lack of trust, it derives primarily from the inherent conflict of the dual roles of commander and convening authority. Checks and balances are needed “to ensure that the inherent conflicts that can occur between respect for the chain of command on the one hand, and impartial investigation and adjudication of service offences on the other, do not undermine the legitimacy of the whole military justice apparatus.”<sup>397</sup>

At face value the “lack of trust” argument is appealing. There are two weaknesses in it. The short answer to the Canadian soldier’s question posed above is that we do not trust someone to do something they are not trained to do. A commander and those who aspire to command train all their military life for the eventuality that they may someday have to lead their forces into battle. When the battle eventually comes, the frenetic pace of battle and the “fog of war” provide no alternative but to trust the commander to do what he has been

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<sup>394</sup> See discussion *infra* Parts III, IV.E.1.

<sup>395</sup> *United States v. Berry*, 34 M.J. 83, 88 (C.M.A. 1992) (“Courts-martial must not only be fair but must appear fair to effectively further the cause of good order and discipline in the armed forces.”).

<sup>396</sup> See discussion *infra* Part VI.B.10.a.

<sup>397</sup> *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie2.htm>>.

trained to do—to lead his forces into battle. A commander is not trained, and does not train all of his military life to “administer the military justice system.” The commander’s experience and training in administering the military justice system is limited in the first instance by the very short period of time he is privileged in his military career to hold a command. Military justice is a collateral duty and something that takes time away from his primary mission of training to fight. The decision to refer charges to trial by court-martial is the preeminent tactical decision affecting the military prosecutor’s battlefield—the courtroom. The decision to refer charges ultimately requires subsequent tactical decisions that require extensive knowledge of the military justice system. Critical among them is how to charge the case, the assessment of what the case is worth, whether it can be proven beyond a reasonable doubt, or whether a negotiated plea should be accepted. It is doubtful that the commander of an infantry battalion would trust his judge advocate to make the tactical decisions for his battalion on the battlefield. Yet, our system of justice allows the commander to make the tactical decisions on the prosecutor’s battlefield.

Any suggestion to elevate the power to refer charges in the chain of command to “more experienced” commanders as a possible solution for the lack of training and experience with the military justice system of more junior commanders also falls short of the mark. As has been seen by the cases cited, unlawful command influence is not just exerted by new, inexperienced commanders. General and flag officers that have prior experience in command and have judge advocates on their staffs advising them have caused the worst damage. In fact, the amount of damage caused appears to increase geometrically with the rank of the commander. As seen by the volume numbers of the military justice reporters for

the cases cited in part IV of this article, the problem continues today despite the “checks” created by Congress.

Our evidence of inappropriate administration of military justice comes to us through an artificial screen<sup>398</sup>—those cases that meet the criteria to make it to the service courts of criminal appeals. As has been previously noted, unlawful command influence is difficult to discover and harder to prove.<sup>399</sup> These are the cases where it was detected and exposed. Who knows how many “sub rosa” agreements between a trial and a defense counsel bargained away the issue before *Weasler*.<sup>400</sup>

The second answer to the question posed above is that the commander who argues that he must have the power to refer charges to trial by court-martial to maintain discipline in his unit gives too much credit to courts-martial and not enough to his own abilities as a leader. Threats in the form of referral to trial by courts-martial should be the tool of absolute last resort in the most egregious of cases. Perhaps the ultimate mark of the discipline of a unit is

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<sup>398</sup> Cf. *United States v. Cortes*, 29 M.J. 946, 949 (A.C.M.R. 1990) In holding that the acting convening authority’s post trial approval of the appellant’s sentence for drug related offenses was not improperly influenced by a scathing editorial written by the convening authority for the base newspaper about the dangers of illegal drugs and those who are involved with them, the court remarked:

Our decision should not convey a lack of concern either as to the published article or as to MG Boylan’s ability to act as convening authority in courts-martial involving illicit drugs. That issue will be addressed **when and if it is brought before us**. (emphasis added).

<sup>399</sup> See *United States v. Dubay*, 37 C.M.R. 411, 413 (1967) (“In the nature of things, command control is scarcely ever apparent on the face of the record . . .”).

<sup>400</sup> *Weasler*, 43 M.J. 15 (Recognizing the ability of the accused to waive any objection to improper interference with the preferral and referral of charges through a pretrial agreement.).

its ability to successfully "carry the fight" in battle. Soldiers do not follow their commanders into battle because of the threat of the military justice system.<sup>401</sup>

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<sup>401</sup> HOMER E. MOYER, JR., JUSTICE AND THE MILITARY §3-113 (1972) (citing to R. RIVKIN, GI RIGHTS AND ARMY JUSTICE: THE SERVICEMAN'S GUIDE TO MILITARY LIFE AND LAW 336-338 (1970):

During World War II a team of social psychologists conducted for the War Department an extensive study, consisting of numerous opinion surveys, on the attitudes of American fighting men. In an attempt to discover the motivations that made men fight, they interviewed a veteran division of two Mediterranean campaigns, as well as company-grade officers who had served in the European and Pacific theaters. The enlisted men were asked the question:

Generally, in your combat experience, what was most important to you in making you want to keep going and do as well as you could?

Seventy-eight per cent of the responses included these motivations: (1) to get the war over with; (2) not to let their buddies down; (3) to get home to their loved ones; (4) a sense of doing one's duty; and (5) self-preservation.

A small percentage mentioned patriotism or hatred for the Nazis. *Only one per cent of the men said they fought because of "leadership and discipline," in which was included the fear of court-martial.* Of course, as the authors point out, the men might not have wanted to admit the extent to which these factors were important to them. But by the same token the officers probably exaggerated (as they tended to do in the other surveys) the importance of their own leadership in getting the men to fight. The question asked the officers was worded this way:

When the going is tough for young men, what do you think are the incentives which keep them fighting?

*Only nineteen per cent of their comments expressed the belief that the men fought because of motivations of leadership or fear of discipline.* One thing that supports these findings is the fact that if a soldier wanted to go AWOL, desert, or misbehave in the face of the enemy he did not need to fear the death penalty. Except in cases of murder it was virtually never used. So he was not faced with the dilemma of possible death on the battlefield versus certain death if convicted of a crime. He fought, the authors concluded, for other reasons, largely determined by what he expected of himself and what he knew his buddies and his family expected of him.

The implications are apparent to everyone but the people who run the military establishment. *Americans do not fight primarily because they are afraid of criminal punishment if they should refuse.* These findings were confirmed by studies made during the Korean war:

Positive status legends [exaggerated stories about a commander's combat performance] often referred to the commander's democratic eccentricities, his concern for human life, or his tolerance of deviations from the policies of the larger organization. Such positive legends assured the commander of warm, affectionate responses and willing cooperation from his subordinates.

No new survey is required to "prove" that such findings and conclusions apply to combat morale in Vietnam. As a matter of fact, it is almost the universal feeling of combat veterans that combat conditions automatically "equalize" privates, NCOs, and officers to the point where all social distinctions temporarily disappear, and the fear of court-martial is played down. (Most officers in combat learn very quickly to become "one of the boys," and there are stories of terrible accidents that have befallen officers who failed to appreciate

The consequences that flow from a court-martial conviction, chief among them being the deprivation of liberty and a lifelong federal conviction, make the stakes too high to rely on a commander's "fairness" to administer the system properly. There must be systemic checks to prevent abuse. Those previously provided by congress have proved marginally effective.

There can be no argument with the concept that "a strong chain of command is absolutely essential to any efficient and disciplined military."<sup>402</sup> While the creation of an independent prosecutor with the power to refer charges to trial by court-martial would reduce the power of the commander, "it will strengthen the chain of command in the long run by restoring its legitimacy."<sup>403</sup>

## *2. The Commander is Responsible*

Under the law of war, commanders may be held responsible for failure to control their troops and to maintain discipline. Therefore, we should hesitate to infer from the general language of Article 37 the existence of such

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that fact of life in time.) Combat conditions *require* a spirit of cooperation between leaders and led that might well be instilled in training in an enlightened Army.

When the combat performance of the low-ranking officer is compared with that of the low-ranking enlisted man additional proof is provided that deprivation and terror are not necessary to make good soldiers. It is known that through friendships, class protectiveness, and dismissal procedures officers escape court-martial for crimes that enlisted men to [sic] to jail for. It is also apparent that officers enjoy a great many more physical comforts, considerably more privacy, and the sense of well-being that accompanies displays of respect. Yet no military authority has ever suggested that because of these luxuries officers are less reliable than corporals in combat. And of course they are not. (internal citations omitted).

<sup>402</sup> *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie2.htm>>.

<sup>403</sup> *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie2.htm>>.

limitations on the commander's power to assure that crimes are referred to tribunals that can mete out adequate punishment.<sup>404</sup> (citation omitted).

General Yamashita was held criminally liable for atrocities committed by his troops against prisoners of war and the civilian population during World War II.<sup>405</sup> At the time of these atrocities, he was the military governor of the Philippines and commander of Japanese forces on the islands.<sup>406</sup> The military commission that tried him helped to establish that the "Law of War" imposes a duty on a commander to take "such appropriate measures as are within his power to control the troops under his command."<sup>407</sup>

The commander's loss of referral power will not place him at greater risk of *criminal conviction* for the "war crimes" of his troops based on his alleged failure to control them. While a "necessary and reasonable step" may have been "referral" under the old model, it will be a "recommendation for referral" under the new model. The military commission did not find General Yamashita criminally liable for failing to take acts which "were beyond his

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<sup>404</sup> United States v. Drayton, 39 M.J. 871, 874 n. 6 (A.C.M.R. 1994) (citing to *In Re Yamashita* 327 U.S. 1 (1946).

<sup>405</sup> *In Re Yamashita* 327 U.S. 1, 14 (1946).

<sup>406</sup> *In Re Yamashita* 327 U.S. 1, 16 (1946).

<sup>407</sup> *In Re Yamashita* 327 U.S. 1, 15 (1946); see also U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 501 (18 July 1956) [hereinafter FM 27-10]

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. **The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.** (emphasis added)

control.”<sup>408</sup> Similarly, no future court will hold a commander criminally responsible for a failure to court-martial a soldier when he no longer has the power. “Responsibility” may lie with command,<sup>409</sup> but “criminal responsibility” is altogether different. The transfer of referral power *will* place the commander at greater risk of *criminal prosecution* when he has failed to take “necessary and reasonable steps” to prevent the commission of atrocities by his troops. We can learn that lesson from the experience of Canadian forces in Somalia.<sup>410</sup>

### 3. *Will it Work in The Joint Environment & During Deployments?*

The last decade has witnessed a dramatic rise in the number of joint operations, task forces and deployments conducted by our military. In order to support our national objectives today, the military Services task organize, deploy and fight predominantly as a unified force. In this environment, service members serving side by side should not be governed by rules that result in the conduct of one being a punishable offense, while the same conduct by another is condoned. Such differences in treatment are antithetical to good order and discipline, and corrosive to morale, particularly so as we move towards an increasingly joint environment. I do believe that it is appropriate to permit some differences in Service regulations to reflect unique customs, traditions and cultures. However, it is critical in today’s military environment that we strive to eliminate as many differences in disciplinary standards as possible.<sup>411</sup>

There is no reason why the military district attorney model could not work as effectively in the deployed environment as it could in garrison. For small forces or deployments of short

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<sup>408</sup> *In Re Yamashita* 327 U.S. 1, 16 (1946). (“There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances.”).

<sup>409</sup> LUTHER C. WEST, *THEY CALL IT JUSTICE* 186 (1977).

<sup>410</sup> See discussion *infra* Part 0.

<sup>411</sup> Memorandum from the Under Secretary of Defense for Personnel and Readiness to the Secretary of Defense, Subj: Ensuring the Good Order & Discipline Required For Effective Military Forces (Jul. 29, 1998) <[http://www.defenselink.mil/pubs/go\\_d\\_usdpr07291998.html](http://www.defenselink.mil/pubs/go_d_usdpr07291998.html)> (This excerpted portion of the Under Secretary’s memorandum was under the subheading “Uniform Personal Relationship Policies.”).

duration, there is always the option of returning the accused to the “installation” district attorney. For large forces and deployments of long duration, a district attorney can deploy with the joint task force. A deployed district attorney’s office could be “purple suited” to meet the needs of a joint task force comprised of multiple services. It is crazy to suggest that a district attorney in theater would call for the convening of a court-martial when the commander is ready to step across the line of departure.<sup>412</sup> Nevertheless, as a fail-safe against a district attorney’s lack of judgment, a provision could be created to suspend his power to call for the convening of a court-martial in time of conflict.<sup>413</sup>

#### 4. *What Protection Against the Rabid Prosecutor?*

The abuse of “prosecutorial discretion” is not a problem unique to military commanders. The military district attorney is equally capable of abusing his discretion.<sup>414</sup> Abuse of discretion by a rogue military district attorney is potentially more devastating to the system. More power would be concentrated in his hands than now exists in the hands of any single commander.

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<sup>412</sup> William Generous cites to two reasons for the “almost unanimous view” that a judge advocate should not have the power to convene courts-martial. The first involved the “court-martial as a tool of discipline” model with the “commander best suited to decide when it was in his unit’s interest” corollary. The second involved its damage to combat efficiency. As the author put it:

It could reasonably be asked, for example, how great an impediment would it have been had Patton’s army had to supply company commanders and tank battalion officers for courts-martial during its race across France in 1944. Only a line officer in command could determine in situations like that who could most easily be spared for such collateral duty. No rear echelon lawyer was so qualified, line officers insisted.

*Cf.* GENEROUS *supra* note 23 at 28.

<sup>413</sup> *Cf. supra* note 4, R.C.M. 401(d), 407(b); *see also supra* note 4, UCMJ art. 43(e) & (f).

<sup>414</sup> *See* Herman Schwartz, *Excess Not Limited to Special Prosecutors*, L.A. TIMES, Mar. XX, 1999, at XX.

There are a number of checks against such abuse. The prerequisite qualifications to fill the job are one.<sup>415</sup> Published prosecutorial guidelines would be another.<sup>416</sup> An appeal process to the service wide, district attorney is a third.<sup>417</sup> Removal for misconduct is a fourth.<sup>418</sup>

Similar concerns could be expressed over the potential “rabid” military judge—be he “too prosecution oriented” or “too defense oriented.” On balance, the benefits of an independent military district attorney make this “risk” worth taking.

##### *5. The NJP/Summary Court Refusal*

The commander has always been able to “back up” the refusal of nonjudicial punishment and summary court with the prospect of referral to trial by special court-martial. The transfer of referral power to the district attorney would change the equation. A commander’s inability to guarantee trial by court-martial in case of these refusals may “open the floodgates” to more such refusals hoping the district attorney will decline to prosecute.

This consequence will be a “positive.” The “wheat will be separated from the chaff.” If the charge is supported by evidence and the commander is perceived to be fair, an accused will be more apt to accept nonjudicial punishment and less likely to risk a court-martial and its greatly enhanced punishments. The military district attorney will not be blind to the potential increase in “refusals.” The commander may always “make his case” for

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<sup>415</sup> See discussion *infra* Part VI.A.1.

<sup>416</sup> See discussion *infra* Part VI.B.10.

<sup>417</sup> See discussion *infra* Part VI.A.3.

<sup>418</sup> See discussion *infra* Part VI.A.2.

prosecution to the district attorney. The military district attorney will lend a sympathetic ear to the commander's concerns. In those cases where a commander believes the prospect of court must be a reality in case of a "refusal," he may consult with the district attorney before offering nonjudicial punishment to get an advisory opinion. Many well-informed commanders already do this in the present system.

Make no mistake, there will be cases where the military district attorney will decline to prosecute a "refusal" for reasons other than he cannot spare the resources, or that the charge is unsupported by evidence.<sup>419</sup> If prosecution is declined, the commander's hands are not tied. In addition to appealing the decision,<sup>420</sup> he still has available a host of administrative measures with which to handle the misconduct.<sup>421</sup>

The issue can also no longer be framed by either side, commander or accused, as one of "backing down." Neither one "blinks first" at the brink because it is the district attorney who referees the contest.

#### *6. The Commander Knows his Soldiers and is Best Positioned to Make the "Right Call"*

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<sup>419</sup> Every "nonjudicial punishment refusal" should not automatically result in the commander's "throwing down the gauntlet" for trial. In 1998, an accused stationed aboard Marine Corps Air Station, El Toro, California was tried at special court-martial for a violation of article 92, disobedience of a lawful general regulation. The sole specification alleged that the accused violated the regulation by "failing to wear his seat belt" while driving a vehicle aboard base. The accused plead not guilty to the charge and the case was tried before a panel of members. The military judge detailed to the case was a reserve Marine Corps lieutenant colonel serving two weeks of annual active duty training. In his "civilian life," the military judge was a state circuit court criminal judge in Cook County, Chicago. At the close of the government's case on the merits, the military judge sua sponte raised, and granted, a motion for a finding of not guilty on behalf of the accused. After the trial, the trial counsel told the military judge he was happy about the judge's ruling as the case was an "NJP refusal," and he had been unsuccessful in convincing the commander to dispose of the matter administratively. Telephone interview with Major John Havranek, Military Judge, Sierra Judicial Circuit, Navy-Marine Corps Trial Judiciary, Camp Pendleton, Cal. (Mar. 29, 1999).

<sup>420</sup> See discussion *infra* Part VI.A.3.

<sup>421</sup> See *supra* note 227.

While a commander may have the capability to know more about an accused than a civilian prosecutor may,<sup>422</sup> the same cannot be said of the military district attorney and his prosecution team. The small unit commander knows his men personally. There is a good chance that the commander with the power to convene courts-martial may not know the accused personally.<sup>423</sup> The commander as convening authority comes to know the accused by relying on information he receives from his subordinate commanders. The military district attorney and his team of prosecutors can digest service record books, training jackets, platoon commander's notebooks, and interviews with small unit leaders who know the accused personally as easily as the convening authority. There is another source of information. As one commentator pointed out, "a defense counsel engaged in plea negotiations would be expected to bring favorable aspects of his client's record to the prosecutor's attention."<sup>424</sup>

One inescapable conclusion is that the unit belongs to the commander, not the district attorney. The commander's opinion about what is in the best interest of his unit must be heavily weighted. A system of service specific, military district attorneys will accord the commander's opinion the weight it deserves.

## VII. Conclusion

### A. *The False Choice: Discipline or Justice*

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<sup>422</sup> See Robert E. Quinn, *Prosecutorial Discretion: An Overview of Civilian and Military Characteristics*, 10 SAN DIEGO L. REV. 36, 46 (1972).

<sup>423</sup> Fn size of inf battalion /brigade

<sup>424</sup> Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is it Time for a Change?*, 19 AM. J. CRIM. L. 395, 404 (1992).

Some commentators urge that courts-martial must be designed with the furtherance of discipline as their primary objective, others insist that justice must be the ultimate goal of a judicial system and that discipline must be maintained through means other than the court system; still others have contended that the two are not competing concepts, that discipline is strengthened by improving the quality of justice, not by relying on peremptory forms of punishment. Some of the problems are semantic; others are real. In both forms they are the heart of the question of the appropriate role of command in military justice.<sup>425</sup>

When surveyed about the proposed model, Army and Marine commanders responded overwhelmingly that their ability to command would be adversely affected if the power to refer charges to trial by court-martial were transferred to a senior service judge advocate.<sup>426</sup> The written justification most often given in support of this response was twofold. First, the commander is ultimately held responsible for establishing a climate of good order and discipline within his unit.<sup>427</sup> Second, the commander's power to refer charges to trial by court-martial is an indispensable *tool* for achieving that end.<sup>428</sup> This evidences a belief by commanders that the primary purpose of the military justice system is discipline—justice may or may not be a byproduct. Not all commanders have clung to this position over the years.<sup>429</sup>

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<sup>425</sup> MOYER, *supra* note 128 at § 3-113.

<sup>426</sup> See *infra* app. A, Survey Results of The March 2<sup>nd</sup> Resident Commanders' Program, Marine Corps University, Quantico, Virginia (2-5 Mar. 1999); see also *infra* app. B, Survey Results of The 152<sup>nd</sup> Senior Officers' Legal Orientation Course, The Judge Advocate General's School, Charlottesville, Virginia (25-29 Jan. 1999) (on file with author).

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> The following excerpts from an article by General William C. Westmoreland discussing the relationship of military justice to good order and discipline in the Army illustrate this point:

As a soldier and former commander, and now as Chief of Staff of the Army, I appreciate the need for a workable system of military justice. Military commanders continue to rely on this system to guarantee justice to the individual and preserve law and order within the military.

For those who adhere to that philosophy, it is also time to critically challenge the theory that special and general courts-martial remain viable tools of discipline. Article 15 proceedings, summary courts-martial, and administrative discharge proceedings provide a measure of immediate discipline. They are relatively uncomplicated, quick, and efficient means for punishing transgressors and ensuring future obedience to orders. The same can no

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An effective system of military justice must provide the commander with the authority and means needed to discharge efficiently his responsibilities for developing and maintaining good order and discipline within his organization. Learning and developing military discipline is little different from learning any discipline, behavioral pattern, skill, or precept. In all, correction of individuals is indispensable. . . The military commander should have the widest possible authority to use measures to correct individuals, but some types of corrective action are so severe that they *should not be entrusted solely to the discretion of the commander*. As some point he must bring into play judicial process. At this point the sole concern should be to accomplish justice under the law, justice not only to the individual but to the Army and society as well.

I do not mean to imply that justice should be meted out by the commander who refers a case to trial or by anyone not duly constituted to fulfill a judicial role. *A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.*

The protection of individual human rights is more than ever a central issue within our society today. An effective system of military justice, therefore, must provide of necessity practical checks and balances to assure protection of the rights of individuals. It must prevent abuses of punitive powers, and it should promote the confidence of military personnel and the general public in its overall fairness. It should set an example of efficient and enlightened disposition of criminal charges within the framework of American legal principles. Military justice should be efficient, speedy, and fair.

William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 Am. Crim. L. Rev. 5, 5-8 (1971) (emphasis added); see also Major Guy P. Glazier, *He Called for his Pipe, and He Called for his Bowl, and He Called for is Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 94 (1998):

Arguing that the focus or goal of military justice should be discipline *rather than* justice is nonsensical. They are inextricably intertwined. The Ansell-Crowder dispute was *irrelevant*. The question is not whether military justice should be a slave to discipline or a vehicle for the vindication of individual rights. Military justice, like running a motor pool, conducting close order drill, or training an infantry battalion, has a mission. If done properly, it enhances discipline. If done poorly, it detracts from discipline. Like those other activities, it is a mistake to declare its primary purpose to be the maintenance of discipline. Its primary purpose should be the accomplishment of its own mission, in this case maximizing justice, and good discipline will follow. (citation omitted).

longer be said of trial by special or general courts-martial. A natural consequence of the “maturation of the military justice system”<sup>430</sup> is increased delay between time of offense and final disposition. It is difficult to view the special and general court-martial as anything other than an end state (1) for those soldiers who were never amenable to discipline in the first place, or (2) for those soldier where previous attempts to discipline and lead have failed. Its character and use has changed from a mechanism of discipline to a mechanism for separation from the service.

There is an argument more important to the model than the discipline versus justice debate. It involves the danger of the concentration of too much power in the hands of one person.

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.<sup>431</sup>

The military district attorney model is a solution that meets this ideal. Too much power is concentrated in the hands of the commander. For the greater good of the system, the commander must move beyond his hurt feelings over the “lack of trust” he believes the model symbolizes. The accused’s liberty interest should not come to depend on the commander’s moral courage to scrupulously honor the accused’s rights. The well known inflation of performance evaluations and the recent rewrites of the Army and Marine Corps’ performance evaluation systems are a failing “report card” on our organizational lack of

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<sup>430</sup> See discussion *infra* Part VI.B.3.

<sup>431</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

moral courage.<sup>432</sup> The model's diffusion of power, while not a true "separation of powers," will act as a "check" on abuses through the "separation of functions."<sup>433</sup> The model incorporates and envisions a relationship between district attorney and commander of "separateness but interdependence, autonomy but reciprocity." The independent district attorney model will "ensure that the inherent conflicts that can occur between respect for the chain of command on the one hand, and impartial investigation and adjudication of service offences on the other, do not undermine the legitimacy of the whole military justice apparatus."<sup>434</sup> Largely, our military justice system "works." It has made great strides, but further reform is needed. If we do not help to shape that reform from within, a Congress with increasingly less military experience may dictate it to us.<sup>435</sup> Until that time, we will remain a system "looking for respect."<sup>436</sup>

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<sup>432</sup> See *supra* note 142.

<sup>433</sup> See WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW—CASES—COMMENTS—QUESTIONS 199 (6<sup>th</sup> ed. 1986) (citing Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COL. L. REV. 573, 578 (1984)).

<sup>434</sup> *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, Department of National Defence, Canada, (visited Jan. 9, 1999) <<http://www.dnd.ca/eng/min/reports/Dickson/justie2.htm>>.

<sup>435</sup> Thomas W. Lippman, *Socially and Politicaly, Nation Feels the Absence of a Draft*, WASH. POST, Sept. 8, 1998, at A13. The author notes that a majority of members of Congress have no military experience. In the House, the proportion of members with prior military service declined from 40% five years ago to 30%. In the Senate, the percentage dropped during the same period from 61% to 48%.

<sup>436</sup> See generally David A. Schlueter, *Military Justice for the 1990'S—A Legal System Looking for Respect*, The Twentieth Annual Kenneth J. Hodson Lecture delivered to The Judge Advocate General's School, U.S. Army (Mar. 28, 1991), in 133 MIL. L. REV. 1 (1991).

# **APPENDIX A**

# VOLUNTARY SURVEY FOR A STUDENT THESIS WRITER IN THE 47<sup>TH</sup> GRADUATE LAWYER COURSE (USMC SURVEY)

1. Have you previously commanded or led at any of the following levels:

Platoon	32 YES / NO	12
OIC	33 YES / NO	11
Company	31 YES / NO	13
Battalion/Squadron	24 YES / NO	20
Regiment/Brigade/Group	0 YES / NO	44
Installation	1 YES / NO	43

2. How many Article 15 proceedings have you held? 0 6 1-10 8  
10+ 30

3. How many Summary courts-martial have you convened? 0 12 1-10 30  
10+ 2

4. Have many Special courts-martial have you convened? 0 29 1-10 13  
10+ 2

5. Have you ever **appointed** an Article 32 investigation? 0 32 1-10 12  
10+ 0

6. How many times have you **forwarded** charges to a superior commander recommending trial by:

Special court-martial? 0 13 1-10 28

10+ 3

General court-martial? 0 33 1-10 11

10+ 0

7. Without the benefit of legal advice, how would you rate your ability to decide the appropriate disposition of a case (Article 15, SCM, SPCM, or GCM)? GOOD 33  
FAIR 10 POOR 1

8. Without the benefit of legal advice, how would you rate your ability to predict what sentence a military judge will adjudge in a court-martial in which the accused has plead guilty?

(No response = 1) GOOD 12 FAIR 24 POOR

7

9. "Military justice" is a specialized field of knowledge unique to judge advocates who practice in it.

AGREE 12 DISAGREE

32

10. While it may be sound practice to always consult with a legal advisor first, at some point in their careers, commanders become knowledgeable enough about "military justice" matters to make decisions on their own about the appropriate disposition of a case.

**VOLUNTARY SURVEY FOR A STUDENT THESIS WRITER IN THE 47<sup>TH</sup>  
GRADUATE LAWYER COURSE (USMC SURVEY)**

("Not all the time" = 1)  
DISAGREE 10

AGREE 33

11. Who is better suited to make the decision about the appropriate disposition of a case?

("Both" = 1)  
ADVOCATE 4

COMMANDER 39 JUDGE

12. Who should make the final decision about sending a case to a court-martial?

ADVOCATE 1

COMMANDER 43 JUDGE

13. What percentage of the time did you **consult** with your legal advisor/trial counsel **before** deciding to handle charges at an **Article 15**? \_\_\_\_%

100 = 2

75 = 1

70 = 1

50 = 3

30 = 1

25 = 4

20 = 1

10 = 15

5-10 = 1

5 = 3

0 = 7

No response = 5

14. What percentage of the time did you **consult** with your legal advisor/trial counsel **before** referring or recommending that charges be referred to any type of **court-martial**? \_\_\_\_%

100 = 15

90 = 1

80 = 1

60 = 1

50 = 4

40 = 1

30 = 2

25 = 5

20 = 1

10 = 5

5 = 1

0 = 1

No response = 6

15. In those cases where you have consulted with your legal advisor/trial counsel on whether to handle charges at an **Article 15**, what percentage of the time would you say that you **followed** the advice you received? \_\_\_\_%

**VOLUNTARY SURVEY FOR A STUDENT THESIS WRITER IN THE 47<sup>TH</sup>  
GRADUATE LAWYER COURSE (USMC SURVEY)**

100 = 7  
 95 = 1  
 90 = 10  
 80 = 4  
 75 = 3  
 50 = 5  
 40 = 1  
 "most" = 1  
 No response = 12

16. In those cases where you have consulted with your legal advisor/trial counsel on whether to refer or recommend that charges be referred to any type of **court-martial**, what percentage of the time would you say that you **followed** the advice you received? \_\_\_\_%

100 = 16  
 95 = 2  
 90 = 7  
 80 = 1  
 75 = 4  
 70 = 2  
 50 = 5  
 40 = 1  
 1 = 1  
 No response = 5

17. Based upon your career contact with Marine judge advocates, do you view them as:  
 A. "Marines FIRST and lawyers SECOND" or B. "lawyers FIRST and Marines SECOND"

Marines first = 29  
 Lawyers first = 14  
 "Depends if TC or DC" = 1

18. How do you rate Marine judge advocates' understanding of the importance a commander places on the discipline of a unit in order to accomplish the mission?

GOOD 28 FAIR 14 POOR

2

19. Have you ever **felt pressure** from a superior in your rating chain to dispose of a case in a certain manner? YES / NO (If no, skip to question

21)  
 Yes = 11  
 No = 32  
 No response = 1

20. If you **felt pressure** to make an alternate disposition of a case, in what direction was the pressure?  
 INCREASED SEVERITY / DECREASED SEVERITY

# VOLUNTARY SURVEY FOR A STUDENT THESIS WRITER IN THE 47<sup>TH</sup> GRADUATE LAWYER COURSE (USMC SURVEY)

**Increase = 8**  
**Decrease = 2**  
**Both = 1**  
**No response = 33**

21. Do you believe the superior who rates you uses your handling of disciplinary issues within your unit as an evaluative criterion? YES / NO

**Yes = 30**  
**No = 13**  
**No response = 1**

22. Who should be in charge of administering the courts-martial system?  
 ADVOCATES\_\_\_ COMMANDERS\_\_\_ JUDGE

**Commanders = 30**  
**Judge Advocates = 11**  
**Both = 1**  
**Not sure of the meaning of "administering" = 2**

23. In a high profile case, who is better able to resist political pressure regarding the appropriate disposition of a case? COMMANDERS\_10\_ JUDGE ADVOCATES\_5\_  
 BOTH\_28\_ (NA = 1)

24. How do you believe the following groups would "rate" our military justice system?<sup>437</sup>

OFFICERS	__41__ FAIR	__2__ UNFAIR (No response = 1)
STAFF NCOs	__42__ FAIR	__0__ UNFAIR (No response = 1)
JUNIOR ENLISTED	__37__ FAIR	__5__ UNFAIR (No response = 2)

24. How would your ability to command be affected if the following proposed modification was made to our military justice system:

Commanders retain the power to conduct Article 15 proceedings; and  
 The power to convene and refer charges to a court-martial (to include Article 15 refusals) is completely transferred from a commander to a Marine judge advocate in the grade of O-5/O-6, serving in a billet equivalent to a "district attorney" for that installation.  
 (Feel free to use this sheet to expand your comments and/or to qualify any of your answers.)

<sup>437</sup> The survey of Marine Corps commanders took place after the survey of Army commanders. This question was added to the Marine survey to test their perception of how they believe other distinct population groups would "rate" the system's fairness.

**VOLUNTARY SURVEY FOR A STUDENT THESIS WRITER IN THE 47<sup>TH</sup>  
GRADUATE LAWYER COURSE (USMC SURVEY)**

**Adverse effect/not support = 39**

**No adverse effect/support = 2**

**Support only in cases where chargeable offenses closely approximate civilian felonies =  
1**

**No adverse effect if SJA considers commander's desires in cases handled above article  
15 = 1**

**Not sure = 1**

# **APPENDIX B**

**VOLUNTARY SURVEY FOR A STUDENT THESIS WRITER IN THE  
47<sup>TH</sup>**

**GRADUATE LAWYER COURSE (ARMY SURVEY)**

1. Have you previously commanded or led at any of the following levels:

Platoon	18	YES / NO	5
OIC	14	YES / NO	9
Company	22	YES / NO	1
Battalion/Squadron	14	YES / NO	9
Brigade/Group	3	YES / NO	20
Installation	0	YES / NO	23

2. How many Article 15 proceedings have you held? 0\_\_3\_\_ 1-10\_\_5\_\_  
10+\_\_15\_\_

3. How many Summary courts-martial have you convened? 0\_\_17\_\_ 1-10\_\_5\_\_  
10+\_\_1\_\_

4. Have many Special courts-martial have you convened? 0\_\_23\_\_ 1-10\_\_0\_\_  
10+\_\_0\_\_

5. Have you ever **appointed** an Article 32 investigation? 0\_\_19\_\_ 1-10\_\_4\_\_  
10+\_\_0\_\_

6. How many times have you **forwarded** charges to a superior commander recommending trial by:

**Special court-martial?** 0\_\_9\_\_ 1-10\_\_12\_\_

10+\_\_2\_\_

**General court-martial?** 0\_\_19\_\_ 1-10\_\_4\_\_

10+\_\_0\_\_

7. Without the benefit of legal advice, how would you rate your ability to decide the appropriate disposition of a case (Article 15, SCM, SPCM, or GCM)? GOOD \_\_7\_\_  
FAIR \_\_12\_\_ POOR \_\_4\_\_

8. Without the benefit of legal advice, how would you rate your ability to predict what sentence a military judge will adjudge in a court-martial in which the accused has plead guilty?

GOOD \_\_0\_\_ FAIR \_\_14\_\_ POOR

\_\_9\_\_

9. "Military justice" is a specialized field of knowledge unique to judge advocates who practice in it. AGREE \_\_7\_\_  
DISAGREE \_\_16\_\_

10. While it may be sound practice to always consult with a legal advisor first, at some point in their careers, commanders become knowledgeable enough about "military justice" matters to make decisions on their own about the appropriate disposition of a case.

("sometimes" = 1) AGREE \_\_8\_\_

DISAGREE \_\_14\_\_

**VOLUNTARY SURVEY FOR A STUDENT THESIS WRITER IN THE  
47<sup>TH</sup>  
GRADUATE LAWYER COURSE (ARMY SURVEY)**

11. Who is better suited to make the decision about the appropriate disposition of a case?  
COMMANDER\_23 JUDGE

ADVOCATE\_0\_

12. Who should make the final decision about sending a case to a court-martial?  
COMMANDER\_23 JUDGE

ADVOCATE\_0\_

13. What percentage of the time did you **consult** with your legal advisor/trial counsel **before** deciding to handle charges at an **Article 15**? \_\_\_\_%

100 = 11

99 = 1

90 = 1

75 = 2

66 = 1

50 = 2

25 = 1

10 = 1

0 = 1

No response = 2

14. What percentage of the time did you **consult** with your legal advisor/trial counsel **before** referring or recommending that charges be referred to any type of **court-martial**? \_\_\_\_%

100 = 19

No response = 4

15. In those cases where you have consulted with your legal advisor/trial counsel on whether to handle charges at an **Article 15**, what percentage of the time would you say that you **followed** the advice you received? \_\_\_\_%

100 = 6

95 = 5

90 = 5

80 = 3

50 = 1

No response = 3

16. In those cases where you have consulted with your legal advisor/trial counsel on whether to refer or recommend that charges be referred to any type of **court-martial**, what percentage of the time would you say that you **followed** the advice you received? \_\_\_\_%

100 = 13

99 = 1

95 = 1

90 = 3

**VOLUNTARY SURVEY FOR A STUDENT THESIS WRITER IN THE  
47<sup>TH</sup>  
GRADUATE LAWYER COURSE (ARMY SURVEY)**

**80 = 1**

**75 = 1**

**No response = 3**

17. Based upon your career contact with Army judge advocates, do you view them as:

A. "soldiers FIRST and lawyers SECOND" or B. "lawyers FIRST and soldiers SECOND"

**Soldiers first = 7**

**Lawyers first = 15**

**"soldier/lawyer" = 1**

18. How do you rate Army judge advocates' understanding of the importance a commander places on the discipline of a unit in order to accomplish the mission?

(No response = 1)      GOOD 18 FAIR 4 POOR

0

19. Have you ever **felt pressure** from a superior in your rating chain to dispose of a case in a certain manner?

YES / NO (If no, skip to question

21)

**Yes = 9**

**No = 14**

20. If you **felt pressure** to make an alternate disposition of a case, in what direction was the pressure?

INCREASED SEVERITY / DECREASED

SEVERITY

**Increase = 8**

**Decrease = 0**

**Both = 1**

**No response = 14**

21. Do you believe the superior who rates you uses your handling of disciplinary issues within your unit as an evaluative criterion?

YES / NO

**Yes = 13**

**No = 10**

22. Who should be in charge of administering the courts-martial system?

COMMANDERS\_\_\_ JUDGE

ADVOCATES\_\_\_

**Commanders = 17**

**Judge Advocates = 4**

**Not sure of the meaning of "administering" = 2**

23. In a high profile case, who is better able to resist political pressure regarding the appropriate disposition of a case?

COMMANDERS 3 JUDGE ADVOCATES 4

BOTH 16

**VOLUNTARY SURVEY FOR A STUDENT THESIS WRITER IN THE  
47<sup>TH</sup>  
GRADUATE LAWYER COURSE (ARMY SURVEY)**

24. How would your ability to command be affected if the following proposed modification was made to our military justice system:

Commanders retain the power to conduct Article 15 proceedings; and  
The power to convene and refer charges to a court-martial (to include Article 15 refusals) is completely transferred from a commander to an Army judge advocate in the grade of O-5/O-6, serving in a billet equivalent to a "district attorney" for that installation.

(Feel free to use this sheet to expand your comments and/or to qualify any of your answers.)

**Adverse effect/not support = 18**

**No adverse effect/support = 3**

**Support if judge advocate is within the same service = 1**

**Not sure = 1**